FIRE AT-WILL:
EMPLOYEE TERMINATIONS IN PENNSYLVANIA

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I. **AT-WILL BASICS**

The employment at-will doctrine, in its most basic form, provides that an employer may terminate an employee at its will, and an employee may terminate his or her employment at its will with no legal recourse for the non-terminating party. Absent contractual or statutory restriction, either the employer or the employee may terminate the employment relationship for good reason, bad reason, or no reason at all. See *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022, 1025 (Pa. Super.), allocatur denied, 600 A.2d 539 (Pa. 1991).

As a general rule, an at-will employee has no claim against an employer for termination of employment or “wrongful termination.” *Paul v. Lankenau Hosp.*, 569 A.2d 346, 348 (Pa. 1990); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). “Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.” *Clay*, 559 A.2d at 918. Since then, the Pennsylvania Supreme Court has held fast and stated, “As our previous jurisprudence has shown, this Court has steadfastly resisted any attempt to weaken the presumption of at-will employment in this Commonwealth.” *McLaughlin v. GastroIntestinal Specialists*, 750 A.2d 283, 290 (Pa. 2000).

**Practice Tip:** The odds favor the employer defending a wrongful termination claim.

One of the earliest pronouncements of the employment at-will doctrine in Pennsylvania comes from *Henry v. Pittsburgh & Lake Erie R.R. Co.*, 21 A. 157 (Pa. 1891) stating that, “[an employer] may discharge an employe [sic] with or without cause at pleasure, unless restrained by some contract . . . .” *Id.* at 157. This statement is true today, although there are exceptions to termination beyond an express contract. Well over a century after *Henry*, employers are cautious before discharging employees and must keep in mind the common law exceptions to the employment at-will doctrine and the myriad statutory exceptions restricting an employer from unencumbered termination of its employees.

Although most every case involving at-will employment assumes there is an employee -- as distinguished from an independent contractor -- there are indications that the body of law applicable to at-will employment is just as relevant to independent contractors. In *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003), Fraser was an independent contractor for Nationwide authorized to sell insurance on an exclusive basis under an agent’s agreement. *Id.* at 109. Fraser claimed he was terminated for filing complaints with the Pennsylvania Attorney General’s office regarding alleged illegal conduct of Nationwide. *Id.* Nationwide countered that Fraser was terminated because he was disloyal by offering Nationwide’s customers to competitors. *Id.* Fraser claimed wrongful termination. Nationwide succeeded on summary judgment, and the Third Circuit affirmed the dismissal of the wrongful discharge claim stating Fraser’s termination did not fall within any recognized public policy exception to the at-will employment doctrine. *Id.* at 113. In doing so, the Third Circuit rejected Nationwide’s argument that public policy exceptions did not apply because he was an independent contractor, not an employee. Instead, the appeals court made a significant and unexplained assumption that independent contractors subject to termination at-will would be considered the same as at-will employees. The Third Circuit stated, “Because no Pennsylvania case addresses whether there are limitations on a company’s ability to terminate an independent contractor (as opposed to an
employee), the District Court assumed arguendo that the public policy cases apply equally to independent contractors. We too proceed by so assuming without deciding the question.” Id. at 111. Under Fraser, therefore, an independent contractor will enjoy the same protections and rights as an at-will employee.

**Practice Tip:** Employers should not assume that an independent contractor cannot sustain an action for wrongful termination. Independent contractors should not assume there is no cause of action against its contracting employer.

Also, it has been held that employment at-will is not a “property interest” protected by the 14th Amendment to the United States Constitution. *See Keefer v. Durkos, 371 F. Supp. 2d 686, 692-93 (W.D. Pa. 2005).*

For general discussions on at-will employment, see the following:


Kurt H. Decker, *Pennsylvania’s Whistleblower Law’s Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will Employees?*, 38 Duq. L. Rev. 723 (Spring 2000)


There are three primary areas of exception to the employment at-will doctrine: (1) statutory; (2) contractual; and (3) public policy.

II. **STATUTORY EXCEPTIONS**

There are a variety of statutory “exceptions,” that is, legislative restrictions that prevent an employer from terminating an employee. Most provide a remedy to an employee if terminated in violation of the statute. Although not exhaustive, the following list illustrates the
variety of statutory exemptions.

1. **Title VII**, 42 U.S.C.A. §§ 2000e-2000e-17 (West 2011): prevents adverse job action as a result of discrimination with respect to an individual’s race, color, religion, sex or national origin, or in retaliation for making such claims.


3. **The Americans With Disabilities Act of 1990** ("ADA"), 42 U.S.C.A. §§ 12101-12213 (West 2011): prevents adverse job action on the basis of disability, as defined, or one who is perceived as having a disability.

4. **The Pennsylvania Human Relations Act** ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 2011): prevents adverse job action for discrimination based upon race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability and use of guide animals, or in retaliation for making a claim. The PHRA further prevents discrimination against an employee or prospective employee based on passing a general educational development ("GED") test as opposed to a high school diploma.


action of military personnel for fulfilling military duties.

11. **The Criminal History Records Information Act**, 18 Pa. Cons. Stat. Ann. §§ 9101-9183 (West 2011): Section 9125 governs the use of criminal records and states that felony and misdemeanor convictions may be considered by the employer only to the extent they relate to the applicant’s suitability for employment in the position for which he has applied.

12. **Protection of Employment of Crime Victims, Family Members of Victims and Witnesses**, 18 Pa. Cons. Stat. Ann. § 4957 (West 2011) (related to the Crime Victims Act): prevents adverse job action if the employee attends court as “a victim of, or witness to, a crime or a member of such victim’s family.” Employee may be reinstated, recover wages and benefits lost and attorneys’ fees.

13. **Commercial Drivers**, 75 Pa. Cons. Stat. Ann. § 1619 (West 2011): prevents adverse job action because an employee (a) refuses to operate a commercial vehicle in accordance with state safety laws, (b) has filed a complaint or instituted a proceeding relating to a violation of the state safety laws, or (c) has a “reasonable apprehension of serious injury to himself or the public due to the unsafe condition” of the vehicle or equipment. Employee may be reinstated, recover wages and benefits lost, compensatory damages and attorneys’ fees.

14. **The Medical Care Availability and Reduction of Error Act**, 40 Pa. Cons. Stat. Ann. § 1303.308(c) (West 2011): prevents a health care worker who reports the occurrence of a serious event or incident regarding patient safety from being retaliated against for reporting the event or incident and provides the health care worker with all the protections and remedies of the Pennsylvania Whistleblower Law.

**Practice Tip:** A close examination of each statute must be made as each has its own definitions and prerequisites that will determine its applicability in any given situation.

**III. CONTRACT EXCEPTIONS**

**A. Express Contracts**

By definition, an employee at-will is not contractually bound to the employer. It follows, that if an employee has an express employment agreement for a certain term, the employee is no longer at-will and may only be discharged pursuant to the terms of the contract. See also Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3d Cir. 2003) (public policy exception to at-will employment applies to independent contractors who may be terminated at-will as well as at-will employees).

Employment is presumptively at-will unless an employee can provide clear proof that an express contract exists for a specific term or duration of employment, or that the contract provides for discharge only for just cause or other specified reasons. Holewinski v. Children’s

In Scully v. US WATS, Inc., 238 F.3d 497 (3d Cir. 2001), an employee who had been terminated from his position as the company’s president and chief operating officer before the end of his two-year employment contract and before he could exercise his stock option sued the company and three of its former officers and directors for breach of contract, conspiracy, fraudulent and negligent misrepresentation and violations of the Pennsylvania Wage Payment and Collection Law. With respect to the at-will presumption, the Third Circuit Court of Appeals stated,


Scully, 238 F.3d at 505. The Scully court found that plaintiff proved he and his employer orally agreed to a two-year contract and, as such, employee successfully defeated the presumption of at-will employment.

Disputes also arise, especially with public employees, over whether an employee is actually subject to a contract if a probationary period is instituted by the employer. Upper Makefield Twp. v. Pennsylvania Labor Relations Bd., 753 A.2d 803 (Pa. 2000) (unless the terms of police officer’s probationary period specifically grant him avenues of redress, the relationship is strictly at-will and terminable by either side for the duration of the probationary period). See also Pennsylvania State Police v. Pennsylvania Labor Relations Bd., 764 A.2d 92 (Pa. Commw.

Often, an employee will argue that because their salary is computed to a specific time period, a term of employment is created. This is not the case. *See Booth v. McDonnell Douglas Truck Servs., Inc.*, 585 A.2d 24 (Pa. Super.), *allocatur denied*, 597 A.2d 1150 (Pa. 1991). Moreover, an employee is not guaranteed a term of employment as a result of a promise to maintain employment if performance is good. *See McWilliams v. AT&T Info. Sys., Inc.*, 728 F. Supp. 1186 (W.D. Pa. 1990) (intention to offer specific term of employment may not be inferred from employer’s statement that employee would not be terminated as long as she performed work in a satisfactory manner). *But see Steinberg v. 7-Up Bottling Co. of Philadelphia*, 636 A.2d 677 (Pa. Super. 1994) (where employer and employee agreed that employee would be hired on a trial basis, that meant a “reasonable” trial basis, and discharge after one and one-half days was not reasonable time for employee to prove he could do the job).

A written statement by an employer with respect to the length of an assignment has been held to have created an agreement for a definite duration that overcame the presumption in favor of at-will employment. *See Janis v. AMP, Inc.*, 856 A.2d 140 (Pa. Super. 2004). In *Janis*, the Dauphin County Court of Common Pleas, determined AMP, Inc.’s “summary of the policy provisions” provided to Janis during his employment was an agreement for a definite duration. The “summary of the policy provisions” stated in pertinent part,

> The assignment is expected to last three years but no more than five years. Based on business needs, the employee may be returned to the United States prior to July 1995 and the company may entertain a personal request to return sooner.

*Id. at 144.*

After trial on the issue, the jury found in favor of plaintiff and awarded $117,384, finding that the employee overcame the presumption of at-will employment. Defendant appealed. The Superior Court held the provision was sufficiently clear to establish that Janis’ assignment was contemplated by both parties to be between three and five years and thus affirmed the jury verdict. *Id. at 146-47.*
Practice Tip: Employers are advised not to make any statements orally or in writing that can be construed as a guarantee of employment for any length of time. Such statements could be contractually binding and give an employee rights to be employed beyond what was expected or intended.

B. Employee Handbooks

To overcome the at-will presumption, “there must be either an express contract between the parties, or an implied-in-fact contract plus consideration passing from the employee to the employer from which the court can infer the parties intended to overcome the at-will presumption.” Sharp v. BW/IP Int’l, Inc., 991 F. Supp. 451, 459 (E.D. Pa. 1998) (citing Anderson v. Haverford College, 851 F. Supp. 179, 181 (E.D. Pa. 1994)).

The burden is on the employee to prove the parties intended to overcome the at-will presumption and that the parties intended to create an employment relationship different than employment at-will. See DiBonaventura v. Consolidated Rail Corp., 539 A.2d 865, 867 (Pa. Super. 1988). The burden is “very great” and requires a showing of a “clear statement of an intent[] to so modify.” Id. at 868.

It is for the court to interpret a handbook, utilizing a reasonable person standard, to discern whether it contains evidence of the employer’s intention to be legally bound. Anderson, 851 F. Supp. at 181 (citing Ruzicki v. Catholic Cemeteries, Inc., 610 A.2d 495, 497 (Pa. Super. 1992) (“Under the reasonable person standard, a handbook is only enforceable as a contract if a reasonable person in the same position as the employee would interpret its provisions as evidencing an intent by the employer to overcome the at-will presumption.”)); Schoch v. First Fid. Bancorporation, 912 F.2d 654, 660 (3d Cir. 1990) (court has duty to determine if evidence is sufficient to defeat at-will presumption).

In Luteran v. Loral Fairchild Corp., 688 A.2d 211 (Pa. Super.), allocatur denied, 701 A.2d 578 (Pa. 1997), Luteran challenged a Court of Common Pleas determination that he was an at-will employee who was properly discharged. Luteran contended the employee handbook contained clear and unequivocal language which established he could only be fired for just cause. The handbook set forth details regarding the employer’s numerous policies and included the following provision:

You may only be discharged for cause. Some examples of just cause are excessive tardiness, absenteeism, insubordination, dishonesty, pilferage, incompetence, inefficiency, intoxication, use of drugs on the job, attempting to influence fellow employees to limit production and deliberately damaging company property or injuring a co-worker.

Id. at 213.

The Luteran court rejected the employee’s assertion that the provision evidenced an intent by the employer to create an implied contract whereby he could only be discharged for objective cause only. The court determined “the list of actions set forth in the handbook which call for discharge are nothing more than common sense enumerations of actions that any reasonable at-
will employee would understand to call generally for discharge.” *Id.* at 215. The court stated the list was nothing more than an “aspirational statement by the employer listing actions that generally will not be tolerated” and that the list served merely an “information function.” *Id.* The court held, therefore, the provision did not create the contractual relationship so asserted by the employee.

In *Preobrazhenskaya v. Mercy Hall Infirmary*, No. CIV.A.02-3190, 2003 WL 21877711, at *3 (3d Cir. July 30, 2003), cert. denied, 540 U.S. 1150 (2004), the Third Circuit rejected an employee’s argument that the provisions of an employee manual stating that “permanent” employment begins after a 90-day probationary period and which provided a list of reasons why an employee may be dismissed from employment constituted a contract for employment. The Third Circuit adopted the Magistrate Judge’s finding that “in order for an employee handbook to constitute a contract, it must contain a clear indication that the employer intends to overcome the at-will presumption” and refused to overturn the Magistrate Judge’s finding that the employee manual served an informational, rather than a contractual, purpose. *Id.*

Pennsylvania courts agree that an appropriate disclaimer is sufficient to overcome an employee’s argument that the handbook creates a contract for employment. Thus, an employer may issue statements in an employee handbook that are not contractually binding, so long as such statements are accompanied with an “appropriate, conspicuous disclaimer.” *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 840 (Pa. Super. 1986), allocatur denied, 523 A.2d 1132 (Pa. 1987); *see Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 338 (Pa. Super. 1988) (“great clarity is necessary to contract away the at-will presumption”); *see also Anderson*, 851 F. Supp. at 182 (“Courts have held that provisions in employee handbooks which contain disclaimers or state there is no intent to create an employment contract are sufficient to retain the at-will presumption”); *Lynady v. Community Med. Ctr.*, 49 Pa. D.&C.4th 391 (Pa. Com. Pl. 2000) (letter notifying plaintiff of his termination along with the defendant’s human resources policy and procedure manual, from which the letter was based, did not create an implied employment contract sufficient to negate the at-will presumption). In *Ruzicki*, the court found where the handbook disclaimer stated its purpose is “not intended to give rise to any contractual obligations or to establish an exception to the employment at-will doctrine,” there was no contract sufficient to defeat the at-will presumption. *Ruzicki*, 610 A.2d at 496.

One commentator has suggested the following language as examples of handbook disclaimers sufficient to disclaim a contractual relationship between the employer and the employee and to preserve the at-will employment relationship. Such language should appear prominently in the front of the handbook:

*This is not a contract of employment. Any individual may voluntarily leave employment upon proper notice, and may be terminated by the employer at any time for any reason. Any oral or written statements or promises to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee. The contents of this handbook are subject to change at any time at the discretion of the employer.*

-or-

{00259668;v2 }
The foregoing personnel policies are not a binding contract, but a set of guidelines for the implementation of personnel policies. The Company explicitly reserves the right to modify any of the provisions of these policies at any time and without notice. Notwithstanding any of the provisions of these policies, employment may be terminated at any time, either by the employer or by the Company, with or without cause.

-or-

These are statements of policy which the Company fully expects to follow. However, they are subject to change from time to time, do not confer any obligation on the Company or right to employment. While we hope in general that everyone’s employment is long-lasting, employees are free to resign at any time just as the Company may terminate employees at any time for any reason not prohibited by law.


Even in the absence of an explicit statement as in Ruzicki or the above examples, the at-will presumption is not easily defeated. In *Rutherford v. Presbyterian Univ.*, 612 A.2d 500 (Pa. Super. 1992), the court determined a disclaimer in an employee manual was sufficient to overcome an employee’s assertions that a contract for employment had been created by the employee manual. The employee manual stated the guidelines found therein were “a summary of the [Hospital Manual] and group benefits policies with insurance companies, and are not intended to be a legal contract.” *Id.* The *Rutherford* court held that this disclaimer clearly indicated the employer’s intent not to confer any rights upon its employees. *Id.* at 504.

The foregoing, however, does not stand for the proposition that an employer cannot create a legally binding contract with its employees via an employee handbook. *See Martin*, 511 A.2d at 841. The *Martin* court stated:

It is for the court to interpret the handbook to discern whether it contains evidence of the employer’s intention to be legally bound and to convert an at-will employee into an employee who cannot be fired without objective just cause. A reasonable employee may be presumed to regard such handbooks as having legally binding contractual significance when the handbook, or oral representations about the handbook, in some way clearly state that it is to have such effect.

¹ These are two excellent sources generally for a wide variety of employment law topics.
In *Bauer v. Pottsville Area Emergency Med. Servs., Inc.*, 758 A.2d 1265 (Pa. Super. 2000), the Superior Court interpreted a provision in an employee handbook that stated “[a]ny employee scheduled for at least 36 hours per week for a period of 90 consecutive days will be treated as a full time employee.” In addition, the handbook enumerated several benefits provided to full-time employees.

Bauer worked the requisite hours for the requisite number of days and, therefore, believed he was entitled to full-time wages, health insurance and other benefits provided to full-time employees as set forth in the handbook. The employer, however, argued that its employee handbook specifically states it is an “employer at will” and that it reserves the right to terminate employment at any time, thus the employee handbook did not create a binding contract.

The court found for Bauer and reversed the lower court determination. The court held a reasonable person in Bauer’s position “would understand that his continued performance would bear fruits of his employer’s policies.” *Id.* at 1269. The court, however, narrowed the implications of its holding by emphasizing the public policy concerning emergency medical service personnel that made this case unique. “To the extent the service provided is not fully funded by government or is created as a specific arm of a mandated public service, subject to contract or even union-negotiated agreements, there exists wide flexibility in the operative arrangement of the employment relationship.” *Id.* at 1270.

In light of *Martin* and *Bauer*, there is a real question whether an employer should be able to selectively enforce certain provisions in a handbook. For example, can an employer enforce an arbitration provision (as if it were contractually binding on both parties) but then hide behind the disclaimers and not conform to the provisions in its disciplinary policy requiring the employer to provide written warnings prior to termination or disciplinary action? What about the sexual harassment and discrimination policy that promises “a prompt and thorough investigation” when that may not, in reality, occur?

**Practice Tip:** Employers are advised to have qualifying language in all handbooks and statements of policy. To determine whether a contract for employment has been established by an employee handbook, a court will undertake an examination of the handbook’s language, utilizing a reasonable person standard, to determine whether the employer’s policies supplant the at-will presumption.

C. **Additional Consideration Supplied by Employee**

The presumption of at-will employment may be overcome by showing that the employee provided substantial additional consideration to the employer and termination of employment

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2 Be wary of the somewhat anomalous case of *Niehaus v. Delaware Valley Med. Ctr.*, 631 A.2d 1314 (Pa. Super. 1993) in which the Superior Court determined an employer, by approving an at-will employee’s leave of absence in accordance with the guarantee contained in the employee handbook, impliedly agreed to rehire the employee at the end of her leave of absence for at least a reasonable period of time unless she was then unable to satisfactorily perform the duties of her employment. The following year, this holding was reversed without opinion by the Supreme Court of Pennsylvania. *See Delaware Valley Med. Ctr. v. Niehaus*, 649 A.2d 433 (Pa. 1994).
would result in great hardship or loss to the party known to both employer and employee when the contract was made. *Permenter v. Crown Cork & Seal Co., Inc.*, 38 F. Supp. 2d 372, 379 (1999), aff’d, 210 F.3d 358 (3d Cir. 2000); *Darlington v. General Elec.*, 504 A.2d 306, 314 (Pa. Super. 1986), overruled on other grounds by, *Clay v. Advanced Comp. Applications, Inc.*, 559 A.2d 917 (Pa. 1989) (a plaintiff may be able to overcome the at-will presumption when an employee affords his employer a substantial benefit other than the services for which the employee was hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform).

It is important to note, however, where the parties’ intention regarding the issue of at-will employment is memorialized and agreed upon in an unambiguous writing, the intent of the parties is to be ascertained from the document itself. *Walden v. Saint Gobain Corp.*, 323 F. Supp. 2d 637, 646-47 (E.D. Pa. 2004). Therefore, even if an employee could establish that he or she provided an employer with substantial additional consideration, the unambiguous terms of a writing completely preclude an employee from establishing that the employee’s or employer’s conduct or statements evidence an intent to modify the at-will presumption. *Id.*

The *Darlington* court articulated the law regarding an employee providing substantial additional consideration as a means to alter the at-will presumption as follows:

The term “consideration” is not used here as it is in the usual contractual context to signify a validation device. The term is used, rather, more as an interpretation device. When “sufficient additional consideration” is present, courts infer that the parties intended the contract will not be terminable at-will. This inference may be nothing more than a legal fiction because it is possible that in a given case, the parties never truly contemplated how long the employment would last even though additional consideration is present. Even so, the at-will presumption would be overcome. On the other hand, if the parties specifically agreed that the employment would be at-will, even though additional consideration were present, we would expect a court to construe the contract according to the parties’ stated intention and hold it to be at-will. Thus, we start with the usual at-will presumption which, let us say, has not been overcome by evidence of a contract for a term or for a reasonable length of time. Then, if sufficient additional consideration is present, the law presumes this to be sufficient to rebut the at-will presumption. Such a contract could not be rightfully terminated at-will but would continue for a reasonable length of time. . . . However, the presumption created by the additional consideration could itself be rebutted by evidence that the parties specifically contracted for employment at-will.

*Id.* at 314-15.

The additional consideration given to the employer must be substantial. “The at-will presumption is not overcome every time a worker sacrifices theoretical rights and privileges.”
Scott v. Extracorporeal, Inc., 545 A.2d at 339; see Luteran v. Loral Fairchild Corp., 688 A.2d 211, 217 (Pa. Super.), allocatur denied, 701 A.2d 578 (Pa. 1997) (an employee who agreed to a confidentiality clause, a non-competition clause and a clause giving the employer the right to any inventions employee made or conceived was “so minimal” that in no sense could it be said that the agreement rose to the level of additional consideration); Scullion v. Emeco Indus., Inc., 580 A.2d 1356, 1358 (Pa. Super. 1990), allocatur denied, 592 A.2d 45 (Pa. 1991) (a party must provide additional consideration apart from the detriments “commensurate with those incurred by all manner of professionals” in order to rebut the at-will presumption). But see Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir. 1977) (appellate court held that jury could have found additional consideration given by a furniture manufacturer’s representative who gave up representing all other manufacturers and turned down other opportunities to represent other manufacturers, hired an associate at his own expense, guaranteed the creditworthiness of many of his accounts and prior to his employment had been able to offer his customers a full line of furniture, but had to forego that luxury when he went to work for present employer).

Ordinarily, the determination of whether factors constitute sufficient consideration to overcome the at-will presumption is a jury question. See Permenter, 38 F. Supp. 2d at 379; Scullion at 298, 580 A.2d 1358 (“It is a question of fact whether, in a given case, an employee is given additional consideration sufficient to rebut the at-will presumption”). However, a court may rule on the issue when the “evidence is so clear that no reasonable person would determine the issue before the court in any way but one.” Permenter, 38 F. Supp. 2d at 379.

If sufficient additional consideration is found to exist to create an implied contract, the employee may not be fired for the term of the agreement absent just cause. Or, if the agreement contains no specific term of employment, the fact finder may impose a reasonable time period during which the employee may not be fired absent just cause. Curran v. Children’s Serv. Ctr. of Wyoming Cty, Inc., 578 A.2d 8, 11 (Pa. Super.), allocatur denied, 585 A.2d 468 (Pa. 1990); Marsh v. Boyle, 530 A.2d 491, 493 (Pa. Super. 1987) (when the exact period for which the parties intended to contract is unable to be determined, an agreement for a reasonable time will be inferred). Moreover, the “reasonable period” in an implied contract situation should be commensurate with the hardship incurred or the benefit conferred by the employee. Id.

In Curran v. Children’s Serv. Ctr. of Wyoming Cty, Inc., Curran asserted an implied contract of employment was created because he had given additional consideration to his employer by remaining in his position without a pay raise for two years and by obtaining state certification as a licensed psychologist. 585 A.2d at 11. The court, however, disagreed. The court found no additional consideration that would prevent Curran from being subject to termination at-will where “it was appellant’s decision to continue working in a temporary status without an increase in salary . . . [s]imilarly, appellant was aware that licensing by the Commonwealth of Pennsylvania was a condition of employment.” Id. at 12.

In Cashdollar v. Mercy Hosp. of Pittsburgh, 595 A.2d 70 (Pa. Super. 1991), the court upheld a jury verdict in favor of the plaintiff on a claim of breach of implied contract. After much persuasion by Mercy Hospital of Pittsburgh, Cashdollar left his job as vice-president of human resources at a hospital in Fairfax, Virginia where he had worked for over four years, for a similar position at Mercy Hospital in Pittsburgh, Pennsylvania. Mercy Hospital induced Cashdollar to leave his job with promises of future opportunity. Sixteen days after he began his employment, however, Cashdollar was fired. The jury found an implied contract was created.
and held that the hospital breached its contractual obligations. The jury also found additional consideration existed in this instance because the employee conferred a substantial benefit on the employer other than what the position would normally require. Resigning from a secure, high-paying job, selling his house and relocating to Pittsburgh with his pregnant wife and two year old son were determined to be sufficient evidence that an implied contract for employment existed between Cashdollar and Mercy Hospital. See id. at 73-74.

Similarly in News Printing Co., Inc. v. Roundy, 597 A.2d 662, 665 (Pa. Super. 1991), the Superior Court held that by quitting his prior job, rejecting another job offer, selling his Massachusetts house and purchasing a home in Pennsylvania the plaintiff had provided additional consideration sufficient to rebut the at-will presumption and create an implied contract for a reasonable period of time.

In Walsh v. Alarm Security Group, 230 F. Supp. 2d 623 (E.D. Pa. 2002), vacated in part, 2004 WL 605427 (3d Cir. 2004), the Eastern District of Pennsylvania determined evidence existed on the record sufficient for a jury to find that Walsh provided additional consideration to Alarm Security Group and Alarm Security Group knew that Walsh would suffer great hardship and loss by its failure to employ him. The record indicated that Walsh gave up a year-end bonus worth approximately $20,000, moved his wife and two youngest children from California to Philadelphia and was forced to cash out certain stock options at a time which was less than advantageous, all for a promise of employment which never came to fruition. The court held a jury could “conceivably find this to be sufficient additional consideration to support an implied-in-fact employment contract.” Id. at 629.

In Zysk v. FFE Minerals USA, Inc., 225 F. Supp. 2d 482 (E.D. Pa. 2001), plaintiff alleged a breach of an implied employment contract in violation of Pennsylvania common law based upon his discharge. Although plaintiff did not dispute he was an at-will employee of defendant, plaintiff claimed he had provided additional consideration, which created an implied contract for employment for a reasonable period of years, by relocating himself and his family across the country after he was induced to leave another job. The Eastern District of Pennsylvania determined as a matter of law, however, even assuming this case was one of the “rare instances” in which an implied-in-fact contract for a reasonable period of time was created, plaintiff’s two-plus years of employment with defendant more than fulfilled the “reasonable period.” Id. at 502.

The Eastern District of Pennsylvania rejected a former employee’s argument that signing a restrictive covenant at the outset of the employment relationship provided additional consideration and thus altered the employment at-will relationship to one for employment for a reasonable time. Shriver v. Cichelli, No. CIV.A.92-0094, 1992 WL 350226, at *1 (E.D. Pa. Nov. 19, 1992). The court stated, “as long as the restrictive covenant is an auxiliary part of the taking of employment and not a later attempt to impose additional restrictions on an unsuspecting employee, a contract of employment containing such a covenant is supported by valid consideration and is therefore enforceable.” Id. at *4. Thus, based upon the well-settled law of this Commonwealth that “no additional consideration or change in status is required to validate a restrictive covenant contained in an initial employment agreement,” the court rejected the former employee’s argument and granted the employer’s motion for summary judgment. Id.

In Preobrazhenskaya v. Mercy Hall Infirmary, No. CIV.A.02-3190, 2003 WL 21877711, at *3 (3d Cir. July 30, 2003), the Third Circuit rejected an employee’s argument that she had
provided sufficient additional consideration to overcome the at-will presumption when she left her previous employment to accept a new position. The Third Circuit stated, “[l]eaving one job to take another has been held to be simply a reasoned choice of a new career goal rather than additional consideration implying an employment contract.” *Id.* at *4 (citing *Darlington*, 504 A.2d at 315).

**Practice Tip:** Plaintiffs’ attorneys need to think twice before employing an “additional consideration” strategy. Unadvised, it is natural for potential plaintiffs to believe they have provided value to the employer over and above what was expected.

**D. Specific Intent to Harm**


**E. Implied Covenant of Good Faith and Fair Dealing**


The McDaniel court further held that “although the duty of good faith and fair dealing exists in an at-will employment contract, there is no bad faith when an employer discharges an at-will employee for good reason, bad reason, or no reason at all, as long as no statute or public policy is implicated.” *McDaniel*, 58 F. Supp. 2d at 634 (citations omitted).

**F. Tortious Interference with At-Will Employment**

Quite often, in practice, there is a cause of action alleging tortious interference with an employee’s at-will relationship with his or her current or former employer. Commonly this is a claim brought when an employee has left his employer and moved to a competitor, and when there is no apparent employment contract containing a non-competition, non-solicitation or confidentiality provision, allowing a tortious interference with contract claim. It is important, therefore, to determine the nature of the relationship between the employee and employer, that is, whether the employment relationship is contractual or at-will, as this determination will subject an employee to different claims and affect an employer’s defenses.

Although many courts and practitioners believe there can be no tortious interference with an employee’s at-will employment relationship, this is not entirely accurate. It is true the claims are difficult, as a practical matter, to prove, but legally, the claim exists. First, however, we examine the cases that hold against the cause the action.


In *Buckwalter v. Parker*, No. CIV.A.96-4795, 1998 WL 195701, at *4 (E.D. Pa. March 25, 1998), aff’d, 175 F.3d 1010 (3d Cir. 1999), this Court, in light of *Hennessy*, reconsidered a previous opinion it had rendered denying defendant’s motion for summary judgment in which defendant had asserted that he could not be liable for interfering with plaintiff’s employment relationship because plaintiff was an at-will employee. In reconsidering its prior opinion this Court stated:

*We believe that Hennessy accurately predicts how the Pennsylvania Supreme Court would rule on this matter. As the*
Third Circuit has explained, “[i]n adjudicating a case under state law, we are not free to impose our own view of what state law should be; rather, we are to apply state law as interpreted by the state’s highest court in an effort to predict how that court would decide the precise legal issues before us. In the absence of guidance from the state’s highest court, we are to consider decisions of the state’s intermediate appellate courts for assistance in predicting how the state’s highest court would rule. . . . Thus, considering the absence of any appellate case-law stating otherwise, we predict that the rule set out in Hennessy would be adopted by the Pennsylvania Supreme Court.

Id. (emphasis added). Thus, this Court concluded, as a matter of law, plaintiff could not sue defendant for intentionally interfering with his employment because plaintiff’s employment was an existing at-will employment relationship. Id.

The distinction made by Hennessy and its progeny is “prospective” employment -- when there can be interference -- versus “existing” employment, when there cannot.

The Hennessy line of cases is contradicted in part, however, by at least one Pennsylvania Supreme Court case (note Hennessy was a Superior Court opinion) that allowed the claim of tortious interference with an existing at-will employee.

In Morgan’s Home Equip. Corp. v. Martucci, 136 A.2d 838 (Pa. 1957), an employer brought suit in equity against former employees to enforce a restrictive covenant in the former employees’ employment contracts. Suit was also brought against the former employees’ new employer for wrongfully inducing the former employees to terminate their at-will employment. The Supreme Court affirmed the chancellor’s determination that the new employer engaged in the systematic enticement of the employees for the purpose of disrupting the former employer’s business and to obtain the former employer’s confidential information. Id. at 848.

The Supreme Court held two circumstances exist for a viable cause of action for tortious interference with an existing at-will employment relationship and stated:

The systematic inducing of employees to leave their present employment and take work with another is unlawful when the purpose of such enticement is to cripple and destroy an integral part of a competitive business organization rather than to obtain the services of particularly gifted or skilled employees. So also, when the inducement is made for the purpose of having the employees commit wrongs, such as disclosing their former employer’s trade secrets or enticing away his customers, the injured employer is entitled to protection.

Id. at 847 (emphasis added).
Also, in *Keefer v. Durkos*, 371 F. Supp. 2d 686 (W.D. Pa. 2005), ruling on a motion to dismiss, the District Court determined plaintiff sufficiently pled tortious interference against the Defendants (the school directors in their individual capacities) with her existing at-will employment relationship. The *Keefer* Court stated that the Pennsylvania Supreme Court “adopted” the Restatement (Second) of Torts § 766 in its opinion, *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *Keefer* at 698. The *Keefer* Court then reasoned, “Relying upon the guidance provided by Comment (g) [to the Restatement (Second) of Torts § 766], it is clear that § 766 contemplates that at-will contracts can be the subject of the tort of tortious interference with a contractual relationship.” *Id.* at 699.

**Practice Tip:** Tortious interference claims depend upon (1) at-will status; (2) prospective or existing employment; and (3) whether there was a legitimate purpose to the interference or the intent was to cripple and destroy the competitor’s business, or the inducement was made for the purpose of having the employees commit wrongs, such as disclosing their former employer’s trade secrets or enticing away his customers.

**IV. PUBLIC POLICY EXCEPTIONS**

The public policy exception is currently the most controversial issue of the at-will employment doctrine. Pennsylvania courts espouse extreme reluctance to expand the list of public policy exceptions, yet, in the last decade, the list of exceptions has continued to grow, sometimes in surprising ways.

As a general rule, an at-will employee has no claim against an employer for termination of employment or “wrongful termination.” *Paul v. Lankenau Hosp.*, 569 A.2d 346, 348 (Pa. 1990); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). “Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.” *Clay*, 559 A.2d at 918. In *Cisco v. United Parcel Serv., Inc.*, 476 A.2d 1340, 1343 (Pa. Super. 1984), the Pennsylvania Superior Court noted:

The sources of public policy [which may limit the employer’s right of discharge] include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy. . . . Absent legislation the judiciary must define the cause of action in case-by-case determinations.

*Id.* at 1343, *abrogation recognized in Krajsa v. Keypunch, Inc.*, 622 A.2d 355, 359 (Pa. Super. 1993) (“[O]ur Supreme Court’s decisions in *Clay* and *Paul*, preclude us from undertaking the task of creating and forming public policy with respect to wrongful discharge on our own initiative. Instead, in order to find a cause of action for wrongful discharge in at-will employment relationships, the discharge must threaten or violate a clear mandate of public policy.”.

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In Wetherhold v. Radioshack Corp., 339 F. Supp. 2d 670 (E.D. Pa. 2004), plaintiff, an at-will employee, alleged that he was terminated in retaliation for reporting black mold exposure to OSHA. Defendant filed a motion to dismiss arguing there was no Pennsylvania public policy implicated, therefore, the termination was proper. The Court denied the motion to dismiss finding that, although plaintiff cited to federal OSHA regulations (that prohibited termination for making a complaint) and that could not be used to discern a violation of Pennsylvania public policy, plaintiff also cited to a section of the Pennsylvania Worker and Community Right-to-Know Act, 35 Pa. Cons. Stat. Ann. § 7301 (West 2011) (“PWCRA”). Pursuant to the PWCRA, it is “to be read in conjunction with” OSHA, therefore determined the court, plaintiff had set forth a viable cause of action for retaliation.

**Practice Tip:** Employees alleging wrongful termination must be certain to identify Pennsylvania public policy, not a violation of federal law or policy.


Using *Geary, Clay, Paul,* and *Cisco* as a foundation, the courts have established a body of cases that illustrate when a public policy exception will be found.

**A. Workers’ Compensation Act:** In *Shick v. Shirey,* 716 A.2d 1231 (Pa. 1998), the Pennsylvania Supreme Court held that discharging an employee in retaliation for filing a workers’ compensation claim was a violation of public policy. *But see Shafinsky v. Bell Atlantic, Inc.,* No. CIV.A.01-3044, 2002 WL 31513551, at *1 (E.D. Pa. Nov. 5, 2002) (plaintiff’s claim of termination in retaliation for filing a workers’ compensation claim barred because such a cause of action is limited to at-will employees and plaintiff was employed under a collective bargaining agreement); *McNichols v. Commonwealth, Dept. of Transp.,* 804 A.2d 1264 (Pa. Commw. 2002) (claim of wrongful discharge in retaliation for filing a workers’ compensation claim barred by doctrine of sovereign immunity).

Guided by *Shick,* the Supreme Court has expanded the public policy exception to the at-will doctrine in the context of wrongful discharge in retaliation for filing workers’ compensation claims. In *Rothrock v. Rothrock Motor Sales, Inc.,* 883 A.2d 511 (Pa. 2005), the Supreme Court expanded upon *Schick* and held a supervisory employee terminated for failing to dissuade a subordinate employee from seeking workers’ compensation benefits had a cognizable cause of action for wrongful discharge against his employer.


**E. Jury Duty:** In *Reuther v. Fowler & Williams, Inc.,* 386 A.2d 119 (Pa. Super. 1978) the Pennsylvania Superior Court held that discharging an employee for attending jury duty was a violation of public policy. There is also a statutory prohibition preventing the termination of an employee based upon the employee’s attendance or scheduled attendance for jury duty.


According to defendants, amendments to the Pennsylvania statute governing juries and jurors, 42 Pa. Cons. Stat. Ann. §§ 4501-4584 (West 2011), made by the legislature in 1992 were intended to and did in fact exclude employers in the service industry with fewer than fifteen employees from the prohibition against termination or other adverse action against employees for jury service. See 42 Pa. Cons. Stat. Ann. § 4563(d) (West 2011). Moreover, defendants’ argued that plaintiff had a statutory remedy found in section 4563(e), which permits any such employee to be excused from jury service upon request. According to defendants, despite being encouraged to do so by defendants, plaintiff failed to avail herself of her statutory remedy to be excused from jury service and therefore was unable to then claim such a remedy was inadequate and that she is instead protected by a public policy that excluded those in her class.

Judge Feudal, however, disagreed and determined the “mischief” created by such an interpretation is discriminatory, contrary to the other provisions of the statute and would present an “administrative nightmare” for judges and jury administrators. Judge Feudal, instead, determined the legislature’s intent was to exclude employers in defendant’s class from the criminal summary offense and civil penalties set forth in the statute and not to eliminate an employee’s right to bring a claim for wrongful discharge when terminated for serving on a jury. Judge Feudal therefore determined that the statutory provisions upon which defendant had relied were not the exclusive remedy to an employee terminated for serving on a jury and accordingly denied defendants’ motion for summary judgment. See Wolk v. Saks Fifth Ave. Inc., 728 F.2d 221, 223 (3d Cir. 1984) (a claim for wrongful discharge in violation of public policy is not allowed when there is a statutory remedy available).

F. **Criminal Background History:** In Hunter v. Port Auth. of Allegheny Cty., 419 A.2d 631 (Pa. Super. 1980), the Pennsylvania Superior Court held that denying employment based upon prior criminal conviction not related to the position was a violation of public policy. There is also a statutory prohibition that permits an employer to consider felony and misdemeanor convictions only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied. 18 Pa. Cons. Stat. Ann. §§ 9125(b) (West 2011).

G. **Polygraph Test:** In Kroen v. Bedway Sec. Agency, Inc., 633 A.2d 628 (Pa. Super. 1993), the Pennsylvania Superior Court held that discharging an employee for refusal to take a polygraph test was a violation of public policy. There is also a statutory prohibition that prevents an employer from discharging, disciplining or discriminating in any manner against an employee or prospective employee who refuses, declines, or fails to take or submit to a lie detector test. 29 U.S.C.A. §§ 2002(3) (West 2011).


J. Uniform Commercial Driver’s License Act (“UCDLA”): In Cartright v. SCA Packaging North America, No. 10187, 2007 Pa. Dist. & Cnty. Dec. LEXIS 87, at *1 (Pa. Com. Pl. 2007), the Beaver County Court of Common Pleas held that the UCDLA, which prohibits discharging or discriminating against any employee who refuses to operate a commercial vehicle not in compliance with existing safety laws, provides a public policy exception to the at-will employment doctrine.


L. Work Related Incidents: In an apparent effort to avoid creating an implied “good cause” standard attached to at-will termination, courts have found that most day-to-day work related incidents, that is, disputes that arise over terms and conditions of employment (work rules, company policy, etc.) do not provide a basis for a public policy exception. Two
cases stray from this general rule. In *Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699 (3d Cir. 1988), the Third Circuit found it a violation of public policy to discharge a waitress for refusing to serve a visibly intoxicated patron. In *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) the court found a violation of public policy after an employee was discharged for refusing to support company’s lobbying efforts contrary to his personal beliefs.


M. **Privacy:** Issues of personal privacy are among the exceptions Pennsylvania courts have yet to clearly define. See *Borse v. Pierce Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) (violation of public policy when employee discharged for refusal to consent to urinalysis and property search that constituted invasion of privacy); *Smyth v. Pillsbury*, 914 F. Supp. 97 (E.D. Pa. 1996) (no violation of public policy when employee discharged for inappropriate e-mail despite employee’s reasonable expectation of privacy).
N. **Free Speech:** An emerging exception to the at-will doctrine is in the area of free speech, that is, whether an employer may terminate an at-will employee based upon the employee’s exercise of his or her free speech rights in the workplace. In *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983), the Third Circuit held an at-will employee who was allegedly discharged for his refusal to participate in his former employer’s lobbying effort and the employee’s privately stated opposition to the company’s political position had stated a claim for wrongful discharge under Pennsylvania law. The Third Circuit agreed and concluded “a cognizable expression of public policy may be derived in this case from either the First Amendment of the United States Constitution or Article I, Section 7 of the Pennsylvania Constitution.” *Id.* at 899.

In *Fraser v. Nationwide Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001), *aff’d in pertinent part*, 352 F.3d 107 (3d Cir. 2003). Fraser, an insurance agent under an exclusive, terminable-at-will contract with Nationwide Insurance Company sued the company alleging he was terminated, *inter alia*, in retaliation for his First Amendment activities. Fraser alleged Nationwide had retaliated against him for his reports to Pennsylvania authorities regarding Nationwide’s alleged unlawful practices, his leadership role in the Pennsylvania chapter of the Nationwide Insurance Independent Contractors Association (“NIICA”), and his role in drafting a letter to Nationwide’s competitors regarding the potential acquisition of policyholders of the NIICA members in Pennsylvania. Relying exclusively upon *Novosel*, Fraser claimed his termination fell within a public policy exception to at-will employment based Nationwide’s violation of his free speech rights. The Eastern District of Pennsylvania, however, disagreed. The court concluded opinions by Pennsylvania courts subsequent to *Novosel* had narrowly limited *Novosel* to its facts and, therefore, determined even if Nationwide had terminated Fraser solely for these particular First Amendment activities, the court would not second guess Nationwide’s decision to exercise its right under the at-will doctrine to terminate its relationship with Fraser. *Id.* at 643.

In *Khazzaka v. University of Scranton*, No. CIV.A.01-211, 2001 WL 1262320, at *1 (M.D. Pa. Oct. 22, 2001), Khazzaka, an associate professor with the University of Scranton, claimed his termination violated public policy because it was in retaliation for his backing and approving a colleague’s discrimination complaint filed with the Pennsylvania Human Relations Commission based upon her sex and national origin. Khazzaka contended his dismissal was contrary to public policy as it violated his constitutional right to free speech. The Middle District of Pennsylvania determined, however, there was no state action alleged and therefore dismissed Khazzaka’s claim. The court did not express an opinion whether the result would have differed had the defendant been a public university or other state actor.


Occupational Affairs brought suit against bureau officials which included, *inter alia*, a state law claim for wrongful discharge. The Middle District of Pennsylvania, however, held that the wrongful discharge claim was barred by the doctrine of sovereign immunity. The court stated,

> [T]he Pennsylvania sovereign immunity statute states that “the Commonwealth, and its officials acting within the scope of their duties, shall continue to enjoy sovereign and official immunity . . . .” While it is true that Pennsylvania has waived its right to sovereign immunity with respect to certain types of claims, it has not waived its immunity with respect to claims for wrongful discharge.

Moreover, [Plaintiff] has not alleged that the defendants acted outside the scope of their employment. Indeed, his allegations describe the defendants as performing job-related functions. Thus, due to the absence of a colorable allegation that the Commonwealth defendants were acting outside of their employment, the court concludes that [plaintiff’s] wrongful discharge claim is barred by the doctrine of sovereign immunity.

*Id.*

In *Hillegass v. The Borough of Emmaus*, No. CIV.A.01-5853, 2003 WL 21464578, at *1 (E.D. Pa. June 23, 2003), the Borough of Emmaus’ former Borough Manager argued the Borough’s Personnel Policy, which sets forth procedures that the Borough council must follow when terminating Borough employees, constituted an implied contract for employment with the Borough and provided her with property interest in her position sufficient to guarantee her due process and the benefits outlined in the Borough’s Personnel Policy. The District Court rejected this contention holding that municipalities, such as the Borough, are not permitted to enter into employment contracts absent authorizing legislation. *Id.* at *7. The court stated, “[w]ithout specific statutory authority granting a municipality the right to alter the at-will status of a public employee, any contract created by a municipality, whether express or otherwise, is invalid and unenforceable and consequently, does not create a property interest in employment. *Id.* (citations omitted).

O. **Legislative Immunity:** Legislative immunity, an absolute immunity, can be invoked when officials’ actions are legislative in nature. *Gallas v. Supreme Court*, 211 F.3d 760, 773 (3d Cir. 2000). Individuals who are not legislators but whose acts have a substantial legislative nexus are imbued with this absolute legislative immunity. *Id.*

In *Brominski v. County of Luzerne*, 289 F. Supp. 2d 591 (M.D. Pa. 2003), a former chief clerk in the county tax assessor’s office sued the county and individual members of the County Commission and County Board, claiming wrongful discharge. The individual defendants were either County Commissioners, responsible for preparing and adopting the County’s budget, or Board members responsible for overseeing the Tax Assessor’s office. The County Commissioners voted on a proposed budget that included recommendations of the Board members in which plaintiff’s position was eliminated from the County’s budget. The Middle District of Pennsylvania, relying on a Supreme Court determination that the elimination of a
public employment position constitutes a legislative act, granted the individual defendant’s motion for summary judgment on the basis that the individual defendants were entitled to absolute legislative immunity from suit. *Id.* at 594 (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)).

**P. Pennsylvania Worker and Community Right-to-Know Act (“PWCRA”):**

Section 7313 of the PWCRA prohibits employers from terminating employees who file a complaint or assist the Department of Labor and Industry with an investigation into violations of the Act (relating to hazardous materials). *See Wetherhold v. Radioshack Corp.*, 339 F. Supp. 2d 670 (E.D. Pa. 2004) (employee survived motion to dismiss complaint alleging termination in retaliation for reporting safety hazard to OSHA and PWCRA).

**Q. Victims of Medical Malpractice:** Public policy favors allowing the victims of medical malpractice to seek adequate compensation for themselves, and asserting legal claims on behalf of their children.” *See Haun v. Community Health Sys., Inc.*, 14 A.3d 120 (Pa. Super. 2011).

**V. PUBLIC POLICY EXCEPTION FOR CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE**

In 2010, the Supreme Court of Pennsylvania issued a significant decision in *Weaver v. Harpster*, 975 A.2d 555 (Pa. 2010) in which the Court reversed the Superior Court’s holding that a public policy exception to the employment at-will doctrine existed for claims of sexual harassment in the workplace. The Superior Court had held that, although the Pennsylvania Human Relations Act (“PHRA”) defines an “employer” as one who employs “four or more persons in the Commonwealth,” (see 43 Pa. Cons. Stat. Ann. § 953(b) (West 2011)), the trial court erred when it sustained employer’s preliminary objections to former employee’s claims of sexual harassment, discrimination and harassment in violation of the PHRA, constructive discharge in violation of the PHRA and wrongful discharge because employer had less than four employees.

The Superior Court had agreed with the former employee and held “where an employee is prevented from bringing a sexual discrimination suit under the PHRA only because his or her employer has less than four employees, we find a public policy exception to the at-will employment doctrine.” *Weaver v. Harpster*, 885 A.2d 1073, 1078 (Pa. Super. 2005). The Supreme Court, however, rejected the Superior Court’s analysis and held that the PHRA does not provide a public policy exception to the at-will doctrine for sex discrimination by an employer not covered by the PHRA. *Weaver*, 975 A.2d at 569-70.

The Supreme Court stated, “our precedent adhering to the at-will employment presumption indicates that we can only declare the public policy of this Commonwealth where it is ‘so obviously for or against public health, safety, morals, or welfare that there is virtually unanimity of opinion in regard to it . . . .’” *Id.* at 569 (citation omitted). The Court relied upon the fact that the legislature had previously lowered the employee threshold for the PHRA from twelve to six to four, but not to one, which the Court stated demonstrated the lack of a unanimous opinion that every employee in the Commonwealth of Pennsylvania should be protected from sex discrimination. *Id.*
The Court thus concluded that it was bound by the terms of the PHRA and Pennsylvania’s adherence to the doctrine of at-will employment and held that Pennsylvania does not recognize a common law cause of action for discriminatory termination of at-will employment in cases where the employee is precluded from pursuing a remedy under the PHRA. *Id.* at 569-70.

VI. **WHISTLEBLOWING**

A. The Whistleblower Law Does Not Create A Public Policy Exception.

Pennsylvania law does not recognize the right of action of a private employee for whistleblowing activities. The statutory language of the Whistleblower Law, 43 Pa. Cons. Stat. Ann. §§ 1421-1428 (West 2011) (hereinafter “the Whistleblower Law”) is clear -- it applies, without exception, only to public employees. Stated differently, for private employers, whistleblowing activities do not constitute a well-articulated public policy so as to provide an exception to the at-will employee doctrine.

**Practice Tip:** Private employers are not subject to Pennsylvania’s Whistleblower Law, but first make certain the employer does not receive public funds as stated below in Section B.

In *Clark v. Modern Group Ltd.*, 9 F.3d 321 (3d Cir. 1993) the Third Circuit held that the whistleblower law is not an indicator of public policy in private discharge cases. Additionally, there is no general public policy of protecting whistleblowers who are not employed in the public sector. *Id.* at 332; see also *Kraja v. Keypunch, Inc.*, 622 A.2d 355 (Pa. Super. 1993) (scope of whistleblower law is limited to employees discharged from governmental entities or other entities created or funded by government); *Perry v. Tioga Cty.*, 649 A.2d 186 (Pa. Commw. 1994), allocatur denied, 655 A.2d 995 (Pa. 1995) (“there is no general public policy protecting whistleblowers in private sector”); *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) (Pennsylvania’s whistleblower law does not create an expression of public policy sufficient to fall within the narrow exception from the employment at-will doctrine and does not form a basis for allowing a wrongful discharge action).

In *Holewinski v. Children’s Hosp. of Pittsburgh*, 649 A.2d 712 (Pa. Super. 1994), allocatur denied, 659 A.2d 560 (Pa. 1995), a nurse reported concerns that an incompetent doctor was to be hired as Chief of Pediatric Neurosurgery. *Id.* at 714. Despite the protests, the doctor was hired and informed plaintiff that her job would be upgraded. *Id.* Shortly thereafter, she was terminated although she was arguably qualified for the upgraded position. *Id.* Plaintiff filed a claim for wrongful discharge on the basis that the hospital violated public policy. *Id.* at 715.

The *Holewinski* court, held that whistleblowing is not an established public policy:

In the instant case, the public policy at issue is the need to protect whistleblowers. Although there is a whistleblower law in Pennsylvania, 43 Pa. Stat. Ann. § 1421 (1986), it only applies to employees discharged from governmental entities, and therefore
does not protect appellant. Furthermore, as we have already explained in *Krajsa*, 622 A.2d at 358, we are precluded from creating or forming public policy with respect to wrongful discharge. Therefore, as appellant’s claim is not based on an established public policy exception, this claim is meritless.

*Id.*

In *Hunger v. Grand Cent. Sanitation*, 670 A.2d 173 (Pa. Super. 1995), *appeal denied*, 681 A.2d 178 (Pa. 1996), this Court held that, “firing which results solely due to an employee’s decision to report his employer’s illegal activities is not actionable unless the firing is specifically prohibited by statute.”

B. The Broadening Definition of “Employer.”

The Pennsylvania Whistleblower Law defines “employer” as “[a] person supervising one or more employees, including the employee in question; a superior of that supervisor; or an agent of a public body.” A “public body” is defined, in part, as any body created by the Commonwealth or “which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body.” 43 Pa. Cons. Stat. Ann. § 1422 (West 2011).

In 1998, the Pennsylvania Superior Court decided *Riggio v. Burns*, 711 A.2d 497 (Pa. Super. 1998) which held that a private medical institution receiving funds from the state was a “public body” within the meaning of the Whistleblower Law.

In *Riggio*, the plaintiff was terminated as an instructor from the Medical College of Philadelphia for failure to follow departmental leave procedure. The plaintiff claimed she was terminated because she expressed her opposition to another physician’s failure to directly supervise a surgical procedure that resulted in the death of one patient and left a second patient in a coma. The plaintiff claimed she was compelled by various Pennsylvania medical licensing statutes to prevent surgery by unsupervised residents.

The *Riggio* court found the statutes relied upon by plaintiff were too general and vague to present a cognizable claim under the Whistleblower Law. In doing so, however, the court determined that the Medical College of Philadelphia was a public body because it received public funds. The Court stated:

[An attempt to divine the intent of the legislature by reference to the common understanding of “public body” is not only unnecessary, it also begs the question. Notwithstanding the everyday meaning of “public body,” this term was expressly defined by our legislature for purposes of the Whistleblower Law. “Where a statute provides internal definitions, we are bound to construe the statute according to those definitions.”]
If there was any doubt about the interpretation of “employer” in *Riggio*, it was erased with the Superior Court’s decision in *Denton v. Silver Stream Nursing and Rehabilitation Center*, 739 A.2d 571 (Pa. Super. 1999). In *Denton*, plaintiff was a nursing home director and alleged she was wrongfully terminated after being accused of theft and negligence. The court considered the question of whether a privately owned, for-profit business that receives public monies, in this case Medicaid funding, is a “public body.” Citing *Riggio* and the plain language of the Whistleblower Law, the *Denton* court concluded that the nursing home was a public body for the purposes of the Whistleblower Law. Although the defendants argued that only monies specifically intended for a business should constitute funding, the court stated: 

> We do not find that legislatively appropriated funds are the only monies that will create “public body” status under the Whistleblower Law. The statutory language differentiates between appropriated and “pass-through” funds and extends the law to cover both types: “[a]ny other body which is . . . funded in any amount by or through Commonwealth. . . .” (citations omitted). The Law clearly indicates that it is intended to be applied to bodies that receive not only money appropriated by the Commonwealth, but also public money that passes through the Commonwealth. *Denton*, at 576.

*Denton* significantly broadened the scope of the Whistleblower Law and subjects an entire group of businesses to a statute against which they thought they were immune. Query whether the Pennsylvania courts will further define this definition. For example, the statute states that a public body is that which receives funding in *any* amount. Will the court interpret that literally? Is there a de minimis amount an employer can receive that would not subject it to the Whistleblower Law? Will the courts care about how the public funds make their way to the employer? If a charitable or non-profit organization receives state funds and then makes a donation to a business, has that business received public funds? Do the funds have to be in dollars or can “funds” mean, for example, tax forgiveness? Of course, a central question is whether the Pennsylvania legislature will simply amend the Whistleblower Law to include private employers.

For further discussion, see Kurt H. Decker, *Pennsylvania’s Whistleblower Law’s Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will Employees?*, 38 Duq. L. Rev. 723 (Spring 2000).

C. The Fine Line Between Voluntary Action and Obligation.

The courts have continued to draw a distinction between voluntary action and required action by an employee. Decisions have not generally favored employees who engage in whistleblowing activities unless they were clearly and statutorily obligated to act.
In *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. 1989), an employee was discharged because he reported violations involving nuclear materials. The court found a public policy violation because this reporting was a statutorily imposed duty, in other words, the plaintiff would have suffered a penalty if he failed to notify the Nuclear Regulatory Commission of a violation. As an example of such a provision, the statute states,

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Penalty for failure to notify. Any person who knowingly and consciously fails to provide the notice required by subsection (a) of this section [noncompliance with the Act] shall be subject to a civil penalty in an amount equal to the amount provided by section 234 of the Atomic Energy Act of 1954, as amended.
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In *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) the federal district court made clear there is a distinction between “gratuitous disclosure of improper employer conduct and disclosures by persons responsible for reporting such conduct or for protecting the public interest in the pertinent area.” *Id.* at 647 (citing *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1345 (3d Cir. 1990), cert. denied, 499 U.S. 966 (1991) (discharged chemical company employee not responsible for reporting improper emissions or spills)); see also *Gaiardo v. Ethyl Corp.*, 697 F. Supp. 1377 (M.D. Pa. 1986), aff’d, 835 F.2d 479 (3d Cir. 1987) (plaintiff was neither employed in a supervisory capacity nor responsible for quality control).

In *Hennessy v. Santiago*, 708 A.2d 1269 (Pa. Super. 1998), a doctor’s employee reported a rape of a resident to the local District Attorney. The reporting employee was terminated. The Superior Court held the employer had not violated public policy because there existed no duty in the law, regulations or code of professional ethics for the employee to make such a report. *See also Hays v. Beverly Enters., Inc.*, 766 F. Supp. 350 (W.D. Pa.), aff’d, 952 F.2d 1392 (3d Cir. 1991) (not a violation of public policy to discharge a nurse who communicated with a family member about the medical condition of a resident when nurse had no legal duty to make such communication).

In *Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d 1250 (Pa. Super. 1998), *appeal denied*, 786 A.2d 989 (Pa. 2001), the Pennsylvania Superior Court made it clear it did not intend to expand the holding of *Hennessy*. In *Spierling*, the plaintiff searched through “old and discarded” files and discovered what she thought to be evidence of past Medicare fraud. Plaintiff was terminated after reporting this evidence to her supervisor, who in turn, contacted the company’s “Fraud Hotline.”

After her termination, plaintiff sued alleging wrongful discharge. The case was dismissed after argument of defendant’s preliminary objections, and plaintiff appealed.

On appeal, plaintiff cited many statutes that arguably made it a crime or made a person liable for withholding information or taking action to deceive or defraud a governmental agency. Of the various statutes cited by Spierling, however, not one imposed an affirmative duty to report such fraud. These included: Crimes and Criminal Procedure, 18 U.S.C.S. § 1001 (Law. Co-op. 1996) (relating to failure to disclose material information); Crimes and Criminal Procedure, 18 U.S.C.S. § 287 (Law. Co-op. 1993) (relating to a party making false claims); Social Security Act,
42 U.S.C.S. §§ 1320a-7a, 7b (Law. Co-op. 1998) (relating to civil money and criminal penalties for improperly filed claims for medical services); and the False Claims Act, 31 U.S.C.S. § 3730(h) (Law. Co-op. 1996) (relating to false claims for payment). In no statute cited by Spierling did there exist a requirement to investigate or report fraud. Furthermore, the prohibitions of The False Claims Act, 31 U.S.C. § 3729 may apply to those who committed the fraud, but, again, does not obligate the plaintiff to report fraud.

In a 2-1 decision, the Spierling court affirmed the trial court’s dismissal of the case holding there was no violation of public policy because plaintiff was not obligated to report Medicare fraud under any law or regulation. The court stated:

Since Spierling was under no statutorily imposed duty to report the suspected past Medicare fraud, Defendant-Appellees did not request that Spierling commit a crime and there was no specific statutory prohibition against Spierling’s discharge, we find that Defendant-Appellees were within their rights to discharge her as an at-will employee.

Spierling, 737 A.2d at 1254. Compare Ballinger v. Delaware River Port Auth., 800 A.2d 97 (N.J. 2002) (interpreting Pennsylvania law, the New Jersey Supreme Court found plaintiff’s termination for whistleblowing unlawful because plaintiff, as a DRPA police officer, had a statutory obligation to report criminal behavior of fellow officers).

Judge Berle Schiller wrote a scathing yet scholarly dissent which traced the history of at-will employment and concluded that the narrow public policy exception must be expanded. The Pennsylvania Supreme Court denied allocatur.

The Pennsylvania state and federal courts’ reluctance to expand the public policy exceptions to the at-will doctrine was highlighted by the Eastern District of Pennsylvania in McGovern v. Jack D’s, Inc., No. CIV.A.03-5447, 2004 WL 228667 (E.D. Pa. Feb. 3, 2004). In McGovern, from the outset of plaintiff’s employment as a waitress at a bar, she was subjected to sexual comments, innuendos and groping by two male co-workers. Plaintiff repeatedly complained to the owners of the bar to no avail. Ultimately, plaintiff was the victim of a rape that took place in a dark part of the bar by one of plaintiff’s male co-workers. Plaintiff brought suit against the bar and its owners alleging, inter alia, a claim for wrongful termination after she was terminated for reporting the rape to police. Defendants filed a motion to dismiss plaintiff’s wrongful termination claim on the grounds that plaintiff failed to state a claim upon which relief could be granted. The court agreed with defendants and, relying upon Hennessey v. Santiago, 708 A.2d 1269 (Pa. Super. 1998), concluded that since there was no statutory requirement that plaintiff report the alleged rape, defendants had not violated any public policy by terminating plaintiff. Id.

In a Court of Common Pleas case, Castro v. Air-Shield, Inc., 78 Bucks Co. L. Rep. 94 (Aug. 20, 2004), the plaintiff alleged wrongful discharge in violation of Pennsylvania’s public policy. Employee alleged he was fired in retaliation for threatening to report to the Food and Drug Administration safety concerns with a hand ventilator used primarily for infants. Mr. Castro, a licensed engineer, cited FDA regulations to support his argument that his termination was in violation of Pennsylvania public policy. The court, however, found that FDA regulations,
which were of course promulgated as federal law, did not reflect Pennsylvania’s public policy, which instead was determined by examining Pennsylvania’s Constitution, court decisions and statutes. The employee also cited Pennsylvania law that set forth ethical standards for engineers:


(g) For the purposes of this subsection, the code of ethics is as follows: It shall be considered unprofessional and inconsistent with honorable and dignified bearing for any professional engineer:

. . .

(10) To aid or abet any person in the practice of engineering . . . not in accordance with the provision of this act or prior laws.

The Court found that the statute set forth broad-based, generalized rules of conduct that have little, if any, bearing on facts of this case. By their express terms, they do not prohibit or compel conduct, but set forth standards of professionalism and a dignified practice. Clearly, these guidelines do not relate to the commission of a crime, create a duty to report matters to governmental authorities, or prohibit firing an employee for any reason. Thus, they do not fall within the narrow public policy exceptions outline in Hennessy.”


**Practice Tip:** McGovern and Castro demonstrate how hesitant the courts are to expand the public policy exceptions. An employee’s action must be required, not voluntary, to have a reasonable chance of success arguing wrongful termination based on a whistleblowing incident.

It seems arbitrary and somewhat harsh to draw a bright line at a “statutory obligation” to report. For example, even though the various statutes do not require an individual to act, why can’t these same statutes simply act as a basis for a recognized public policy? There are many statutes that don’t require an employee to report violations yet act as a basis for a recognized public policy, for example, the line of cases that found it a violation of public policy to retaliate against an employee for reporting claims under the WPCL, OSHA, Unemployment Compensation Act, Worker’s Compensation Act, etc. See supra Section V “Public Policy Exceptions.” These statutes do not compel employee action, yet have been used as clear pronouncements of public policy in this Commonwealth.

**D. Is it Whistleblowing or Retaliation?**

Employees of a non-public employers that accept no public funds are seemingly defenseless if they blow the whistle on some improper employer practice. Or are they?
Whether or not an employee has any legal protection may very well turn on the exact type of complaint made or information provided about the employer, when the employer knew about the complaint, and what action was taken as a result. In short, whether there was employer retaliation.

An employee may have no protection under the Whistleblower Law for contacting the Pennsylvania Human Relations Commission to report that the employer has failed to post the proper employment-related notices under the PHRA. However, if the employee complains to her supervisor, then contact the PHRC, her claim is now retaliation for making the complaint. Retaliation has long been prohibited by state and federal law, and re-defined and explained in the important case Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); see also Crawford v. Metropolitan Gov’t of Nashville, 129 S. Ct. 846 (2010) (witness in internal investigation protected by Title VII anti-retaliation provisions as “opposing discrimination”).

Pennsylvania has other codified anti-retaliation provisions, for example, the law that protects commercial truck drivers. See 75 Pa. Cons. Stat. Ann. § 1619 (West 2011) (prevents adverse job action because an employee (a) refuses to operate a commercial vehicle in accordance with state safety laws, (b) has filed a complaint or instituted a proceeding relating to a violation of the state safety laws, or (c) has a “reasonable apprehension of serious injury to himself or the public due to the unsafe condition” of the vehicle or equipment).

VII. LIFESTYLE DISCRIMINATION: “WHERE THERE’S SMOKE, YOU’RE FIRED!”

The latest erosion of the employer’s rights to terminate an employee for “good reason, bad reason, or no reason at all” comes from legislation to protect employees from acts of so-called “lifestyle discrimination.” The most common discrimination is against employees who smoke off-duty, but other employee activities include free speech, drinking, overeating, unhealthy eating, and any other activity the employer deems to be contrary to its image or management’s personal beliefs. What about discrimination against people because of personal appearance (non-attractive people)?

Legislation or work rules that protect employees who engage in these activities, effectively create additional protected classes that restrict an employer’s ability to discipline or terminate its employees. This is a debate that transcends the employer-employee relationship and quickly spills into thoughts and beliefs about politics, religion, assumptions about certain classes of people, and our culture in general.

For an excellent review of this topic, although somewhat skewed towards the rights of employees, see an article by the National Workrights Institute titled “Lifestyle Discrimination: Employer control of legal off duty employee activities” and published at www.workrights.org.

VIII. PRACTICAL TIPS WHEN CONSIDERING A WRONGFUL DISCHARGE
A wrongful termination claim is made if an at-will employee is discharged or claims constructive discharge. “An action for the tort of wrongful discharge is available only when the employment relationship is at-will.” Phillips v. Babcock & Wilcox, 355, 503 A.2d 36, 38 (Pa. Super. 1986), allocatur denied, 521 A.2d 933 (Pa. 1987); Ferrell v. Harvard Indus., No. CIV.A.00-2707, 2001 WL 1301461, at *1 (E.D. Pa. Oct. 23, 2001) (an action for the tort of wrongful discharge is only available when the employment relationship is at-will, i.e., without a collective bargaining agreement).

When trying to determine whether or not to file a claim for wrongful termination, Plaintiff’s counsel should consider, and Defendant’s counsel can glean defenses from, the following basic questions:

A. **Analysis of Claim**

- Does the employee have a contract for a specified term? If so, employee is not at-will. (An independent contractor who can be terminated at-will may be treated the same as an at-will employee)

- Is the employee a member of a union which operates under a collective bargaining agreement? If so, employee is not at-will.

- Did the employer distribute a handbook? If so, check for qualifying language that will defeat claims that its provisions create contractual rights in the employee. In rare instances, a handbook will not contain such language. Generally, the handbook will not create such contractual rights and employee will have no claim for a “violation” or failure of the employer to follow the policies set for in its handbook.³

- Did the employer make any express promises to the employee about the length of time the employee would be employed? If so, the employee may have an argument that a contract exists.

- Did the employee provide extraordinary consideration to the employer? If so, employee may have an argument that a contract exists. Be careful, though, virtually every employee feels he or she provided extraordinary consideration to the employer.

- Was the employee discharged in retaliation for filing a claim under any law or regulation? If so, review caselaw to determine whether there is precedent for a wrongful discharge claim. If not, this type of claim will be making new law and will almost assuredly be decided on appeal.

- Was employee discharged for whistleblowing? If so, is employer a public employer? Does employer receive public funds? If no to both, the Pennsylvania

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³ If an employer applies handbook policies differently to an employee than his or her co-workers, however, that may be an indication of discrimination under state or federal law.
Whistleblower Law does not apply, and a whistleblower claim will likely be defeated unless employee can prove he or she was statutorily obligated to report the violation.

✓ Was employee discharged for out of work conduct?

✓ Is employee complaining about disparate treatment which, in your opinion, is discrimination? If so, your claim is a violation of the statute that prohibits discrimination. If the employee is complaining about poor treatment that does not rise to the level of discrimination (e.g., discharge due to difficult supervisor, poor performance reviews, others being treated differently, dispute over attendance), don’t waste your time with a lawsuit. Pennsylvania courts, seemingly, have no interest in expanding the public policy exception to create a “termination for cause” standard.

✓ Make sure your wrongful termination claim is not otherwise pre-empted or controlled by statutory remedies.

✓ If you do prepare a complaint containing a wrongful discharge claim based on the public policy exception, be sure to state specifically the grounds upon which you believe the exception should apply, that is, list the statutes, regulations, or other authority you believe provides a basis for the court to find a recognized public policy of the Commonwealth. If not, you run the risk of having the complaint being dismissed on preliminary objections or, in federal court, a motion under Fed. R. Civ. P. 12(b).

B. **Litigation Avoidance: The Amicable Separation**

1. **Employer’s reasons to negotiate a separation package**
   a. Threat of litigation against the company or its agents.
   b. “Legal” or “illegal” extortion against company or its agents.
   c. Threat of adverse publicity.
   d. Employee will take or divert clients.
   e. Employee will solicit company’s employees.
   f. Employee will divulge confidential information, trade secrets, etc.
   g. Company’s desire for smooth transition of employee’s position, department.
   h. History of negotiation with employees.
   i. Company is “obligated” under written severance policy.
j. Company’s general policy of treating employees fairly and with genuine appreciation.

2. Employer’s reasons not to negotiate a separation package
   a. Lack of funds.
   b. Employer opinion that employee is gouging or misrepresenting situation.
   c. Employer has made previous payments to employee.
   d. Retaliation for employee’s negligence, bad acts.
   e. Company believes severance should be offset against actual or perceived employee cost.
   f. General policy of not negotiating severance packages.
   g. General policy of not exceeding written severance policy.
   h. No reason to negotiate, i.e., no litigation threat, no concern for smooth transition, etc.
   i. Employee does not ask.
   j. Employee has “fired his bullets” and already contacted the press, made claims with administrative agencies, etc.

3. Employee’s reasons for seeking a separation package
   a. Money.
   b. Revenge.
   c. Promise made by Company.
   d. Perception of value and loyalty to Company.
   e. Perception of what is “fair” or “traditional.”
   f. Stated desire to “fix the system.”
   g. Needs continued health benefits and is concerned about pre-existing conditions.
   h. Misunderstands company obligation for severance and/or severance policy.
C.  **Employee Separation Checklist**

**EMPLOYEE SEPARATION CHECKLIST**

Date: ______

Name: ____________________  Referred by: _____________________________

Address: ____________________________

Telephone No: ______________ Fax No. _____________  E-mail: ________________

Employer: ____________________  Conflict check? _______________________

Employer address: ____________________________

Age: ___  Sex: ______  Race: ______  Disability: _______  Religion: _______

National origin ____________  Veteran status __________  GED: ___________

Married: __  Children/ages: ____________  Employee or Independent Contractor?

Start Date with Employer: ____________  End Date: _______________________


Stated Reason for Termination: __________________________________________

Direct Reports: ______________  Direct Supervisor: _______________________

Name of, and Number in Group: ____________

Others in Group Same or Different?:

   Number of employees at your location?

   All locations?

Employment Contract (Restrictive Covenants)?:

If so, when executed?  Consideration given?

What State law applies?

Violation of statute?

Public Policy violation?

Statute of Limitations?

Currently working? with a competitor?

Take clients when you left?
Take employees when you left?
Take inventions when you left?
Take property? Materials?
Violate confidentiality?

Receive 1099? W-2?
Paid in cash?
I.R.C. 409(A) implicated?

401(k)?: __________ Stock Options? Vested?: ________ Other?: ____________________________

Unemployment?:________________________ Letter of Reference?:____________________________
Outplacement offered?:______________
Payment of:
(1) All Wages?
(2) Bonuses?
(3) Reimbursement for Expenses?
(4) Commissions?

Ever sue the company?
Ever act as a witness for or against the company?
Ever complain to anyone about the treatment of another employee?
Your treatment?
Was an investigation conducted involving you?

Company have in-house counsel? Outside counsel?
REVIEW OF SEPARATION AGREEMENT

Any reason to refuse General Release? 

Termination Letter?: Separation Package?: **Due Date for Return: 

Signed any document (Release?): 

Do ADEA/OWBPA requirements apply? _____ 
Does Release go beyond terms of employment? ___ 
Does Release exempt 401(k)/pension plan claims? ______ 
Arbitration provision? _______________ 
Any WARN Act considerations? ____________ 

Negotiation Points:
DOCUMENTS

_____ Employment Contract (current and previous)
_____ Restrictive Covenant/Non-compete/Non-solicitation
_____ Termination Letter
_____ Separation Agreement and Notices
_____ Warning Letters/Performance Evaluations
_____ Commission Agreement/Policy
_____ Bonus Agreement/Policy
_____ Stock Plan (options, warrants, etc.)
_____ Shareholder’s Agreement
_____ Loan documents/Personal Guarantees
_____ Employee Handbook/Policies
_____ Documents prepared by client: timeline, diary, chronology