2016

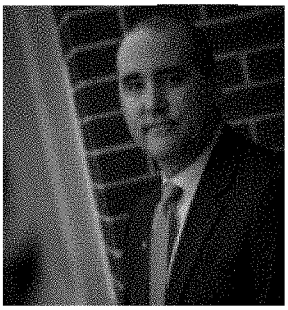
Making Sense of Mid-Term Modifications of at-Will Employment Contracts

Alex B. Long

Making Sense of Mid-Term Modifications of At-Will Employment Contracts

http://worklaw.jotwell.com/making-sense-of-mid-term-modifications-of-at-will-employment-contracts/

Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 **B.C. L. Rev.** (forthcoming 2016), available at SSRN.



Alex B. Long

I'm always pleasantly surprised when I stumble across a piece of scholarship that seeks to solve a doctrinal puzzle in the law. I'm even more pleasantly surprised when the puzzle in question is one that I've puzzled over myself. And I'm really pleasantly surprised when the author offers a convincing solution to the puzzle. Those are but three reasons why I like Rachel Arnow-Richman's article *Modifying At-Will Employment Contracts*.

Arnow-Richman's article explores the contractual enforceability of what she calls "mid-term modifications," a set of non-negotiable contract terms offered by an employer after the start of an at-will employment relationship. These mid-term modifications often involve new terms that are less favorable to an employee, such as covenants not-to-compete or reduced benefits. The situation presents the type of conflict of competing interests that makes employment law so fascinating. Employees, whose employment status is already tenuous under the at-will employment rule, obviously want to be able to rely on "the deal" as to the terms and conditions of their employment when they first started to work. For their part, employers may have a legitimate need for flexibility in responding to changed circumstances. The law is then asked to produce an equitable solution to the conflict when an employer seeks to alter the deal after the relationship has commenced. But as Arnow-Richman demonstrates, "the common law has developed neither a coherent legal framework for analyzing mid-term modifications, nor a cogent theoretical basis for understanding existing doctrine." (P. 3.)

For those who have taught the basic employment law survey course, the dilemma is probably a familiar one. Arnow-Richman lays out the two standard judicial approaches to the dilemma. Under the first (which Arnow-Richman refers to as the "unilateral modification" approach), courts permit employers to unilaterally offer new terms, reasoning that because at-will employment may be terminated at any time, continued employment constitutes consideration for any new terms. In contrast, other courts utilize what Arnow-Richman calls the "formal modification" approach. Under this approach, an employer must provide some additional form of consideration (a bonus, a pay increase, etc.) to support its modification. Arnow-Richman delves into the contract doctrine in the area, exploring the courts' decisions to treat employment relationships as unilateral contracts and their focus on consideration. She concludes that the courts' focus on consideration in this context is something of a relic. Instead, Arnow-Richman looks to more modern conceptions of good faith under the UCC and decisional law involving mid-term modifications of employment handbooks in crafting a proposed rule that strikes the appropriate balance. Ultimately, she advocates for a rule whereby "mid-term modifications unilaterally imposed by employers in at-will relationships should be enforceable only if the employer provides

reasonable advance notice of the change." (P. 5.) In so doing, she argues that her proposed rule "advances the principles of good faith and voluntariness that underlie contemporary contract modification law within the constraints of employment at will."

One of the more refreshing features of the article is that Richman actually dives into the decisional law in an attempt to clarify what the courts are really doing. Instead of merely speculating about how courts approach mid-term modifications to employment relationships, Arnow-Richman digs into the cases and summarizes the different approaches courts take when considering the enforceability of different kinds of mid-term modifications. She looks at cases involving modifications in which employers attempt to impose non-compete agreements, arbitration agreements, and changes to existing employee handbooks and then examines the different ways in which courts respond to such attempts. Equally refreshing is the fact that Arnow-Richman is actually engaging in the type of doctrinal scholarship that sees value in wrestling with conflicting policy values in the face of uncertain case law in an attempt to propose a workable solution. As the issues confronting employers and employees in the modern workplace continue to evolve, the issues that the article explores continue to be of significant importance.

Arnow-Richman's article also comes along at an interesting time in employment law. One of the things I most enjoy about teaching the basic Employment Law survey course is that the course involves a roughly equal mix of tort and contract law. Lately, tort law has taken on an increasingly dominant role, at least in the employment discrimination context. Arnow-Richman's article is a useful reminder of the role that contract law plays in the law of the workplace and how that law needs to evolve to keep pace with the challenges facing employers and employees.

Cite as: Alex B. Long, *Making Sense of Mid-Term Modifications of At-Will Employment Contracts*, JOTWELL (June 22, 2016) (reviewing Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 **B.C. L. Rev.** (forthcoming 2016), available at SSRN), http://worklaw.jotwell.com/making-sense-of-mid-term-modifications-of-at-will-employment-contracts/.