

Employee Handbooks Can Create Legal Liability

Although the use of employee handbooks has become commonplace, they can still create potential legal exposure. A Massachusetts employer recently learned this lesson when a former employee sued it for failing to follow a handbook policy. The Court found that the case must go to trial because a jury could find that the plaintiff reasonably relied on a progressive discipline policy, despite multiple disclaimers in the handbook that the handbook was not a contract. This edition of the Employment Law Advisor outlines this area of law and offers practical tips on how employers can avoid handbook liability.

Ortega V. Wakefield Thermal Solutions, Inc.

This recent case involved the termination of a Wakefield Thermal Solutions supervisor, Jose Ortega. Ortega, who had a clean employment record during his over twenty years with the company, had received Wakefield's employee handbook and signed an acknowledgement to that effect. The handbook contained several provisions stating that the handbook's policies and procedures were not a contract and provided that employment was "at-will" and could be terminated at any time with or without notice or cause.

Wakefield terminated Ortega when he returned three days late from a pre-approved vacation to visit family in the Dominican Republic. Ortega was late to the airport and was not allowed to board his flight. According to Ortega, he was unable to get another flight until several days later. Ortega spoke to his supervisor, who did not indicate his absence would be a problem. Ortega returned to work three days late, and Wakefield fired him on the spot. Wakefield's Human Resource Manager had called a travel agent and determined that there were seats available on other flights that would have allowed Ortega to return much earlier. As such, Wakefield fired Ortega not for return-

Does your Employee Handbook:

- ✓ Provide for "progressive discipline"?
- ✓ Promise fairness or due process?
- ✓ Include policies adapted from the internet?

Then, read on...

ing to work late but, rather, for dishonesty. Ortega sued Wakefield relying, in part, on Wakefield's handbook which provided that "generally" employees would be given advance notice of performance problems. The handbook also provided for "progressive discipline," i.e., when a disciplinary issue arose the Company would: (i) issue a verbal warning, (ii) issue a written warning, (iii) suspend the employee for three days; and (iv) terminate employment. Ortega claimed that, despite the many disclaimers in the handbook, the promise of progressive discipline was binding on Wakefield.

In summary, the court held that whether the handbook created contractually binding commitments was an issue of fact for the jury. The court opined that a jury could find that the handbook was deceptive in that it purported to provide employees with "rights" (such as progressive discipline) but then only if the company agreed to provide such rights. The court minimized the impact of disclaimer language and went so far as to suggest that the inclusion of such disclaimers was fraudulent.

Existing Massachusetts Law

The leading Massachusetts appellate case on whether employee handbooks can create rights enforceable by employees is O'Brien v. New England Telephone and Telegraph Co. In that case, the Massachusetts Supreme Judicial Court held that promises made in an employee handbook can be binding on the employer under certain circumstances. Facts that will impact whether a binding contract exists include: (1) whether there was negotiation over

the handbook; (2) whether the employer retained the right to modify the handbook unilaterally; (3) whether the employee reasonably believed the employer was offering to continue employment on the terms stated in the handbook; (4) whether the employee signed the handbook; and (5) whether the handbook, upon analysis, grants no rights at all. The court, however, did not address whether and to what extent an employer can disclaim contractual intent.

A more recent appellate case, Ferguson v. Host International, Inc., however, held that, with regard to the handbook at issue in that case, the disclaimers of contractual intent in a handbook were the legal equivalent of "fine print" and thus not enforceable where such disclaimers were "buried" in an introductory section of the handbook. According to the Ferguson court, such a disclaimer might be effective if it were made in a "very prominent position" and made clear that there is no promise of any kind made by the employer.

Practical Pointers

The Ortega case should serve as a reminder to employers that handbooks still can create significant legal liability. In the Ortega case, the employer inadvertently exposed itself to liability for having terminated a long-term employee in breach of so-called "rights" in its employee handbook,



when otherwise it was free to terminate this employee “at-will”.

Accordingly, employers that issue employee handbooks should be mindful that handbooks can create legally binding commitments. Unless employers want to be bound by such commitments, employers should review their handbooks to: (i) delete any promises of contractual intent; (ii) eliminate any promise of “fairness” or “due process”; (iii) identify specific areas of exposure, in particular, policies regarding discipline and/or termination (employers should carefully consider whether a “progressive” discipline policy should be contained in writing in a handbook given that the employer may be forced to live up to that policy); and (iv) include detailed, conspicuous disclaimers of contractual intent.

Update Your Handbook?

In light of many changes in employment practices over the last several years, as well as changes in the law governing such practices, employers that have not recently reviewed their handbooks should consider updating them. Handbooks may need updating for a number of reasons including:

- ✓ Changes in the regulatory environment, including:
 - Amendments to the Fair Labor Standards Act regulations governing payment of overtime;
 - Safe harbor provisions regarding improper employee deductions from wages;
 - Amendments to the Uniformed Services Employment and Re-Employment Rights Act (USERRA);
 - Amendments to the Massachusetts Fair Employment Practices Act regarding coverage of new protected categories (including genetic information and military status); and
 - Effect of the Massachusetts Supreme Judicial Court’s decision in Goodridge holding that same sex couples may marry under Massachusetts law.

- ✓ Revisions and/or additions of policies that address the changing nature of today’s workforce, including:
 - Electronic communications policies addressing employee use of blogs, instant messaging (“IM”) and “wikis”;
 - Internet and email use policies
 - Electronic document retention policies
 - Revision of “maternity” leave policies to provide similar leave rights to males;
 - Telecommuting policies;
 - Diversity policies; and
 - Policies addressing transgender employees.

Ensure That New Or Revised Policies Are Implemented Properly

Often, employers who issue new handbooks with revised policies trip up on the implementation of the new employee manual. Although the logistics may vary, employers should ensure that: (i) adequate notice is given to employees of the new handbook; (ii) such notice is provided well prior to the effective date of the new employee handbook; (iii) supervisors are trained about the new policies beforehand; and (iv) employees are provided an opportunity to ask questions about the new policies.

Some Specific Common Handbook Mistakes to Avoid

Having reviewed hundreds of handbooks, we commonly see errors and/or policy statements that may have unintended effects, such as:

- ✓ Including policies in handbooks that the employer is not legally bound to adopt (e.g., often employers include FMLA policies when they are not covered by the FMLA);
- ✓ Including introductions or “greetings” that conflict with the body of the handbook or contain promissory language (“Welcome aboard! Here at Company X, we strive to treat all employees fairly . . .”);
- ✓ Including the following promissory terms or phrases: “unlimited advancement opportunities”, “long-term employment”, “promising future”, “only fired for cause”;

- ✓ Adopting employee classification descriptions or policies that undermine overtime “exempt” status under the federal Fair Labor Standards Act;
- ✓ Adopting a handbook that was obtained from the Internet or using a handbook that was written for another employer;
- ✓ Including policies that directly conflict with state law or not including policies required by state law where the employer operates in multiple states;
- ✓ Including overly broad confidentiality provisions which can potentially conflict with federal labor law; and
- ✓ Promising “fairness” or equitable treatment.

Conclusion

When drafted carefully and implemented properly, employee handbooks can provide real value to employers. A good handbook can improve employee relations and morale by providing clear guidelines on employer policies and employee conduct. Moreover, a well-crafted handbook can provide these benefits while still minimizing the risk that the handbook will unintentionally result in legal liability. Nevertheless, the Ortega case reemphasizes that employers who use employee handbooks must be willing to comply with their policies and recognize that such policies, like the progressive discipline policy in Wakefield’s handbook, can limit the employer’s discretion.

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