

TIPS FOR DRAFTING EMPLOYEE HANDBOOKS – TIP #3: AVOIDING BREACH OF CONTRACT CLAIMS

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This article is part three in a six-part series. The purpose of this series is to provide tips and identify potential pitfalls associated with the drafting of an employee handbook.

While an employee handbook serves many functions, its primary purpose from a legal standpoint is to reduce potential liability with respect to claims brought by current and former employees. Unfortunately, many employers are unwilling to commit the time and bear the expense of implementing an employee handbook (or updating an existing handbook) until after they have been sued and the absence (or poor draftsmanship) of a particular written policy has crippled their defense to an employment claim. Tip #3 explains how including certain language in an employee handbook may help an employer to defend breach of contract claims.

Tip #3: Avoiding Breach of Contract Claims

It is not difficult to form a common law contract. Typically, all that is needed is an offer, an acceptance, and consideration. In most jurisdictions, an employee's acceptance of employment or continued employment following receipt of an employee handbook can satisfy both the acceptance and the consideration elements of contract formation. This leaves only the offer prong to be satisfied, and employees and the plaintiffs' bar have long argued that policies in employee handbooks stating what an employer will (or will not) do in certain circumstances constitute contractual offers or promises, the breach of which can support a breach of contract claim.

For example, an employee may bring a breach of contract claim based on an employer's failure to follow the steps prescribed in its progressive discipline policy set forth in its handbook. Under these circumstances, the employee would argue that the employer promised to take certain progressive discipline before terminating his employment, the employee accepted the employer's contractual offer by agreeing to work for the employer subject to the progressive discipline policy, and the employee's acceptance of this offer of employment provides the consideration for the employment contract.

To avoid breach of contract claims premised on employee handbook policies, employers should include an express contract disclaimer in their employee handbooks.^[1] The disclaimer should

make clear that the handbook does not give rise to contractual rights or obligations of any sort and that either the employee or the employer may terminate the employment relationship at any time, for any reason, with or without cause or notice (i.e., confirming that the employment relationship is “at will”). The disclaimer also should contain a reservation of right by the employer to unilaterally modify the policies in the handbook with or without notice. In the absence of such reservation of right, some courts have held that an employer may not unilaterally modify its policies for current employees without providing such employees some form of additional consideration beyond continued employment. Finally, most jurisdictions require that the disclaimer be “conspicuous,” which typically can be accomplished by including the disclaimer at the very beginning of the handbook in all caps and bold-face font.

In addition to disclaiming that the employee handbook itself gives rise to contractual rights and obligations, the employer also should include language in its handbook stating that no manager, agent, or employee has the authority to enter into any contract with the employee or otherwise alter the “at will” nature of the employee’s employment with the exception of the Company’s President (or some other high-level officer) who may do so only in a writing signed by the President and the employee. Such language is helpful in defending against breach of contract claims brought by employees based on oral statements made by management and other written policies that may be distributed by the employer outside the context of the employee handbook.

Bryan Cave LLP has a team of knowledgeable lawyers and other professionals prepared to help employers draft and update their employee handbooks. If you or your organization would like more information on employee handbooks or employment laws, please contact an attorney in the Labor and Employment practice group.

[1] *Ramirez v. The Geo Group, Inc.*, 655 F.2d 1170 (D. Col. 2009) (contract disclaimer in employee handbook precluded recovery on plaintiff’s breach of contract action premised on defendant-employer’s alleged failure to follow its anti-discrimination and progressive discipline policies set forth in handbook).

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