UNDERSTANDING HANDBOOKS, POLICIES & CONTRACTS

by

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POLICIES VS. CONTRACTS

Although it might sound obvious, it is absolutely ***critical*** that anyone who in HR must understand the difference between "policies" and "contracts." Far too often, the two are used incorrectly and interchangeably.

"Policies" basically tell the employees how the organization is going to operate and how the employees are to conduct themselves while they are employed there. However, once the employment relationship dies, the policy dies. Policies are not enforceable against former employees.

For instance, employers are perfectly able to enforce their "Dress Code Policy" with their current employees. Of course, once these people are no longer working for the organization, then the "Dress Code Policy" is no longer enforceable. Obviously, that makes sense.

However, all too often employers adopt "Confidentiality Policies," which is all well and good. Unfortunately, once the employee leaves the company and the former employee starts revealing this information to others, all too often, there is very little the organization can do about it. The policy has "died" along with the employment relationship … and more often than not there is not any substantive legal protection for the employer to protect itself ... and trying to prove that something is a genuine "trade secret" protected under the law by is no easy task. Even if the organization is able to prove that state or federal law has been broken, the organization will spend thousands of dollars in attorney's fees to stop the former employees from divulging these secrets.

"Contracts," on the other hand, survive the employment relationship. As a result, an employer can enforce a contract ***AFTER*** the employee leaves its employ.

Therefore, if an employer wants to keep its confidential information private and if it wants to keep its former employees from trying to sabotage its client relationships and its public image even after the employment relationship ends, then these protections should be put into ***contracts,*** preferably at the beginning of the employment relationship.

Additionally, contracts are enforceable in court … while policies are not. For instance, if an employee breaches a confidentiality policy, the employee will most likely be terminated. That is the ultimate penalty for breaking a policy.

If the employer then takes this policy into court and asks the judge to order the employee to stop revealing this information, the judge will most likely refuse do enforce your policy. While policies can be used as evidence to support a claim against an employee or former employee, the courts typically do not enforce policies with court orders. The courts enforce contracts.

As a result, if an employer has a "Confidentiality Contract" with an employee, and that employee later goes out and starts revealing this confidential information to others, all the employer has to do is take the contract into court, demonstrate to a judge that the employee, or former employee, is in breach of the contract, then it is much easier to obtain an order from the court telling the person to stop revealing this information. The judge can also order the individual to pay damages and even attorney's fees, if that is what the contract says. (HINT: Employers should very seriously consider including a clause in their contracts that requires the employee to pay attorney's fees if they breach or even threaten to breach a contract. Remember, we want people to abide by our contracts. We do not want to have to pay attorney's fees. The threat of attorney's fees is often a significant motivator for people to "voluntarily" not to breach your contracts.)

Therefore, every employer in every state needs to consider which protections it wants to reserve for itself under not just its policies, which only protect the employer **during** the employment relationship, but it also needs to decide which protections it wants to continue **after** the employee leaves the organization, as well as which protections the employer may want to have enforced by a court of law. (This is why I included a special section entitled "Contracts" in the "Do It Yourself HR Department" packet … which is entirely separate from the "Handbooks & Policies" section.)

Additionally, certain protections are only really preserved under a contractual obligation with employees.

For instance, certain jurisdictions allow employers to limit the statute of limitations for filing a lawsuit against employers under Title VII of the 1964 Civil Rights Act to ***six months***. This can ***greatly*** limit an employer's exposure to lawsuits by requiring employees to file such charges early in the process so the employer will have a better opportunity to defend itself. Moreover, in some situations, employees "sit" on their rights and wait beyond the six month time frame for filing their claims. As a result, such claims will be lost, which is clearly to the employer's advantage.

Also, employers can contractually limit the liability they have when their supervisors make promises or give assurances to their employees that would otherwise be enforceable.

Another issue that arose a few years ago involved the doctrine of "Promissory Estoppel," which basically relates to the binding promises made by the organization's managers and supervisors. ***Yes***, the promises made by an organization's managers and supervisors ***are*** enforceable under the law and in some instances, they trump can an employer's policies.

In one such case, in order to calm down an employee who was upset with her supervisor, the president told an employee that she could come and see him whenever she wanted. The employee insisted that her supervisor would fire her if she ever came to see the president. The president reassured the employee that the organization had an "Open Door" policy and that she could in fact come and see him again if she needed to talk.

Unfortunately, within the month, the employee was given a warning from her supervisor. The employee was so upset that she walked out of the warning session and went to see the president. Of course, the president fired the employee for walking out of the warning session with her supervisor, so the employee sued the organization.

The employer argued that the employee was employed "at-will," so it could terminate her for any reason at anytime.

However, the court found for the employee on the basis of "Promissory Estoppel." Basically, if a supervisor makes a promise to an employee, and that employee relies on that promise, a reasonable person would have relied on that promise, and that promise is later broken and the employee is harmed by the broken promise, then the employer may be "estopped" from breaking that promise. In other words, that employer will be bound to fulfill that promise made to the employee.

Unfortunately, in many jurisdictions, mere policies will not protect an employer from an employee's "Promissory Estoppel" claim. In other words, in many jurisdictions, a claim of Promissory Estoppel by an employee will actually trump the employer's policies.

That is why we use contracts to restate the employment at will doctrine and reserve the following rights:

> "No representative, manager, supervisor, or other representative of the Company has any authority to enter into an Agreement for employment for any specified period of time or to make any agreement for employment other than at-will. The only Company representative who has the authority to make any such agreement contrary to this employment at will status is the president of the Company and then only in writing."

This wording the same as is used in a policy, but when it is placed into a contract, it is given much greater force and can be used to trump a claim of Promissory Estoppel.

Contracts can also be used to protect an employer when someone in management inadvertently provides a bad reference about an employee or a former employer or simply makes some less than "flattering" comments about that person. The contract employees sign upon hire should also state that the employee releases the employer from any and all liability regarding the release of reference information.

Actually, I advise my clients to use a "Reference Release Contract" whenever they release reference information regarding a former employee or whenever they are trying to gather reference information on a potential employee. This way, employers have the protections offered under the contract for whatever they might say about the individual. Using such a contractual release of liability will not only protect the employer from potential lawsuits, but it will also make getting references on potential employees much easier. Employers are much more likely to release reference information when their protections come in the form of a contract rather than under a mere policy.

Remember: Employers can include in their contracts a clause that requires the other individual, such as a potential employee or a former employee to pay its attorney's fees if that person breaches or threatens to breach the contract. This provides the employer with a great advantage in trying to secure its rights.

Therefore, employers need to seriously consider which rights they need to reserve for themselves that they can enforce in court and that will survive the employment relationship. That is when the employer needs to use a contract.

WHAT IS A HANDBOOK?

It is also important for employers to understand the true function of a handbook.

First and foremost, a handbook is ***not*** a reservation of rights for employees. Instead, a handbook is a reservation of rights for the ***employer***.

A properly written handbook places employees on notice as to what the company's rights are and what the company expects from its employees. A handbook is therefore a **tool** for management to use in reserving the rights it will need to run its operations as it sees fit.

Unfortunately, ***most*** handbooks are not written correctly. This is why you hear so many CEOs say that they do not want a handbook because "all a handbook does is tie their hands." If a handbook ever ties a company's hands, it was written incorrectly. It was probably written to reserve rights for the ***employees*.** Writing policies in such a way will surely rear up to "bite" the employer one day because such policies often place a higher standard of care on the employer than what it can live up to or even what they law requires.

For instance, I once had a client who included in its policy manual that it would provide a **written response** to any employee who requested a reasonable accommodation under the Americans With Disabilities Act, or ADA. While providing a written response to the employee is possibly a good idea in some cases because it documents the fact that the employer did in fact address the employee's request, putting such a response in writing is not required under the ADA. However, because the employer included in its policy manual that it would respond in writing, it had placed a higher standard of care on itself than the law required.

Sure enough, one day the unthinkable happened. An employee made a request for a reasonable accommodation under the ADA … and the employer failed to respond to the request in writing. While the employer did verbally respond to the request, there was no written response ever given to the employee.

When the employee later sued the employer under the ADA, the employee argued that the employer never engaged in the "Interactive Process," which means the employer never sat down with the employee and seriously addressed her requests for reasonable accommodations. Even though the ADA did not require the employer to respond in writing, the employer was ***now*** required to respond to such requests in writing because its policy said it would.

In the end, the employer did not meet the standard it had set for itself, so it had to settle the case with the employee.

The moral of the story: You do not write handbooks and policies to tell employee what their rights are or to give them more rights than they are entitled to under the law … even when your intention is to help the employee as much as possible. You write policies to reserve rights for yourself.

In this case, the employer could have tried to put all ADA responses in writing as a good practice, but by putting such a requirement into the policy manual, it then had no choice but to respond in writing every time such situations arose.

Actually, employees do not need to have their rights reserved for them or expounded upon in a handbook. They have Congress and the Department of Labor doing that for them already.

Companies should think of retaining their legal rights in a policy manual like a big buffet. They can go to the buffet and get whatever "legal" food they want. If they want steak, they can get steak. If they want dessert, they can get dessert. ***However***, if they ***do not*** get a certain item from the buffet table … then they might not have it to use later.

It is an employer's choice as to how it runs its business. As long as the employer does not **illegally discriminate** against employees, then the employer usually has every right to conduct itself however it chooses.

What is "illegal discrimination"? Basing employment decisions on someone's protected class status, such as age, race, religion, race, etc.

What is "legal discrimination"? **Everything else,** such as awarding more vacation time to employees who have more seniority. Awarding more vacation time to employees with more seniority is a form of discrimination, since the employer is drawing clear distinctions between two different classes of people … but it is legal. It also has a sense of fairness to it.

Again, it all depends on how you decide to run your business.

For instance, if you work at certain Coca-Cola facilities and you go out on your own time and drink a Pepsi … and your boss sees you, **YOU ARE FIRED**! Fair or not, drinking Pepsi is not a protected class like age, race, sex, etc., so terminating employees for drinking a Pepsi is not illegal. Some Coca-Cola facilities have reserved this right and have placed their employees on notice that such a rule exists. As a result, that is how certain facilities have chosen to run their businesses. Whether that is fair or not is not a matter for the courts to decide. **THAT** is an employee relations issue ... which actually means it is a much **bigger** issue than the law.

Employers need to start thinking of their Employment Applications, Employee Handbooks, their Standards of Conduct and their Substance Abuse Policies as a reservation of **THEIR** rights…tools to use if and when the need arises.

Again, employers must also decide when the correct tool is a "policy" or a "contract."

It is a lot like going to the dentist. When a dentist starts to examine and work on your teeth, the dentist has the tools he/she needs within reach if needed. Dentists **NEVER** sit down to go to work on a patient without their tools ready to go.

Why would a company **EVER** try to run its business … try to manage the biggest part of its budget, its **LABOR**, without the proper tools in place? It shouldn't…but the vast majority of companies do this on a daily basis…making Employment Law one of the fastest growing areas of the law.

Reserving a company's rights is where managing the biggest part of the employer's budget begins.

A tactically designed handbook **UNTIES** the organization's hands, which allows the organization to later accomplish what it wants to do legally. A good way to see if your policies have "untied" your hands as opposed to tying them is to answer these simple questions.

Do your **POLICIES** and **STANDARDS OF CONDUCT…**

- Place employees on notice that all of your policies will be **SUBJECTIVELY** interpreted as **MANAGEMENT DEEMS APPROPRIATE**?

- Require **EMPLOYEES** to stay abreast of all the various changes made to Company Policy? (Having employee sign an acknowledgement every time a change in policy occurs is **RIDICULOUS.)**

- **REQUIRE EMPLOYEES TO SIGN** all Company Documentation, such as I-9 forms, Tax Forms, **WARNING FORMS,** etc., and failure to do so may result in the employee's immediate termination?

- Define **"REASONABLE SUSPICION" SUBSTANCE ABUSE TESTING** as being "**REASONABLE**" according to **MANAGEMENT**?

- Define "**WORKPLACE VIOLENCE**" to include verbal and nonverbal abuse…as interpreted by management?

- Does your handbook include restrictive **PROCEDURES** that the organization will not be able to meet?

Have you considered the difference between "**POLICIES**" and "**CONTRACTS**"?

- Has your organization examined which rights and protections it wants to reserve for itself that are only enforceable under a contract?

- Has your organization examined which rights and protections it wants to be able to enforce ***after*** the employment relationship ends?

All of these considerations should be made before adopting any handbook.

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Business First's 20 People To Know In HR

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Scott Warrick combines the areas of law and human resources to assist organizations in **"Solving Employee Problems BEFORE They Happen."** Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical and entertaining style.

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are favorites for anyone wanting to learn Employment Law and run an HR Department.

Scott's academic background and awards include:

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