

UNDERSTANDING HANDBOOKS, POLICIES & CONTRACTS

by

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POLICIES vs. CONTRACTS

Although it might sound obvious, it is absolutely *critical* that anyone who is trying to establish a Human Resource Department understand the difference between “policies” and “contracts.” Far too often, the two are used incorrectly.

“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 generally 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.” That is all well and good. Unfortunately, once the employee leaves the company and the former employee starts revealing this information, there is often 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.

Another example is with “Duty of Loyalty Policies.” While employed by the organization, the employee is not allowed to go to customers and say disparaging or “mean and nasty things” about the company. However, once the employee leaves the organization, that employee can pretty much contact whomever he wants and try to turn the client against the company. Often times, this happens out of just pure spite.

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

For instance, 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.

However, 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 refuse to 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. They enforce 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. 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 months 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.

Yes, the promises made by an organization’s managers and supervisors **are** enforceable under the law and they **do** trump an employer’s policies in many instances. It is referred to as “Promissory Estoppel.”

Basically, if a supervisor makes a promise to an employee, and that employee relies on that promise, and 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 will 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 courts, policies will not protect an employer from “Promissory Estoppel,” although a contract stating that such assurances or promises are not enforceable will give an employer the protections it desires.

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.

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. This is when we use contracts.

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**.

Employees do not need to have their rights reserved for them in a handbook. They have Congress doing that for them already.

Companies should think of retaining their legal rights 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 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. **THAT** is discrimination, since you are drawing distinctions between two different classes of people ... but it is legal.

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 things work at these facilities. Whether or not that is fair is not a matter for the courts to decide. **THAT** is an employee relations issue.

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?
- **REQUIRE EMPLOYEES** to **COOPERATE FULLY** in Company Investigations?
- Define **INSUBORDINATION** according to **MANAGEMENT'S INTERPRETATION** or the "Reasonable Person" off the street, which is usually an upset employee?
- 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?
- Does your Standards of Conduct Policy define and require employees to engage in "**HONEST/RESPECTFUL COMMUNICATION**" ... as opposed to allowing "Retreaters" and "Attackers" to run your organization?

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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Scott Warrick specializes in working with organizations to prevent employment law problems from happening while improving employee relations. Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go.

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Scott's "[Do It Yourself HR Department & Legal Compliance CD](#)" is a favorite among Human Resource Professionals across the country to not only inform clients of the changes in Employment Law but to also bring their departments into compliance ... **AND KEEP THEM THERE!**

Scott's academic background and awards include:

- Capital University College of Law (Class Valedictorian (1st out of 233))
- Master of Labor & Human Resources and B.A. in Organizational Communication: The Ohio State University
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

Solving Employee Problems BEFORE They Happen!

For more information on Scott, just go to www.scottwarrick.com