

UNDERSTANDING HANDBOOKS, POLICIES & CONTRACTS

by

Scott Warrick, JD, MLHR, CEQC, SPHR
Scott Warrick's Consulting & Employment Law Services
(614) 367-0842: Office ♣ (614) 738-8317: Cell

www.scottwarrick.com

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 working 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 ... and trying to prove that something is a genuine “trade secret” protected 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 “mean and nasty things” about the company. However, once the employee is terminated or laid off, that employee can pretty much contact whomever he wants and try to turn the client against the company, many times out of just pure spite.

“Contracts,” on the other hand, survive the employment relationship. As a result, an employer can enforce a contract beyond the employment relationship.

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.

Every employer 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.

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

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 6 months. This can greatly limit an employers 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.

Also, employers can contractually limit the liability they have when their supervisors might 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. Basically, if a supervisor makes a promise to an employee, and that employee relies on that promise, and that promise is later broken, and a reasonable person would have relied on that promise, then the employer will be “estopped” from breaking that promise. In other words, that employer will be bound to fulfill that promise to the employee. This is referred to as “Promissory Estoppel.” Policies will not protect an employer from “Promissory Estoppel,” although a contract stating that such assurances 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 it needs to reserve for themselves not only in their handbooks with their policies but also under certain agreements, which are what we call “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.

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**.

As a result, most handbooks are written incorrectly.

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 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.

It all depends on how you decide to run your business.

For instance, if you work at certain Coca-Cola bottling 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.

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?
- Require and define “**HONEST/RESPECTFUL COMMUNICATION**” by employees? (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 consideration should be made before adopting any handbook.