

Legislature addresses employee handbooks

By William H. Floyd, III

The South Carolina Legislature is working to address legal problems ailing employee handbooks. Many employers use handbooks to communicate important policies or procedures related to the pay, safety, or conduct of employees. For the past several years, however, South Carolina courts have viewed employee handbooks as possible employment contracts. Employers have responded by rewriting policies, adding disclaimers, or totally eliminating handbooks, resulting in employees knowing less about their workplace. Recognizing the dilemma facing employers and employees, the South Carolina Legislature has prepared a bill that would revive the use of employee handbooks as a more effective communication tool in the workplace by clarifying when a handbook is and is not an employment contract.

Dilemma For Employers

South Carolina common law has long recognized that an employee or employer can end the employment relationship at any time with or without notice or cause, commonly called the "employment-at-will" doctrine. Courts and statutes have gradually eroded the employment-at-will doctrine, restricting when or why employment may be terminated. Recently, that erosion dramatically increased because of court decisions related to employee handbooks.

For more than ten years, South

See Handbooks, Page 8

Continued from Page 1

Carolina courts have considered employer-generated documents, particularly employee handbooks, as potential employment contracts. Our courts initially directed employers to include "conspicuous disclaimers" in handbooks or other documents to counter the risk of the document becoming an employment contract.

Recent South Carolina court decisions have made employers seriously question whether inserting a disclaimer is necessarily sufficient to avoid an implied contract. According to those recent decisions, a jury should resolve most breach of employee handbook cases, even when the handbook has a disclaimer.

As a result, employers have generalized their handbooks to remove any contract-like language, often at the expense of reducing the handbooks' effectiveness as a communication tool in the workplace. Without further guidance from the courts or legislature, South Carolina employers face the disappointing reality of watered-down communications in the workplace and the risk of expensive lawsuits.

Legislative Solutions

Beginning last year, the South Carolina Legislature considered several different bills designed to codify the employment-at-will doctrine and address the employee handbook dilemma. House Bill 3448 emerged as the front-runner when it was approved by the House. The bill went to the Senate, where it stayed during the remainder of 2003.

This year, the Senate resumed debate on H.3448 and revised it. On February 17, 2004, the Senate approved a significantly different version of H.3448. At the time of printing, the bill was currently sitting in the House Labor, Commerce, and Industry Committee.

In its earlier forms, H.3448 codified the employment-at-will doctrine, clarified when a handbook or other document was a contract, and expressly preserved some wrongful discharge exceptions to the at-will doctrine.

Much of the debate in the Senate revolved around the wrongful discharge aspect of the bill, even though it was ancillary to the bill's primary focus on employee handbooks. The Senate considered various amendments, but ultimately rejected complicated options in favor of a very straightforward approach.

The Senate's version of H.3448 implemented basically three sentences:

It is the public policy of this State that a handbook, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed.

For purposes of this section, a disclaimer must be typed in underlined capital letters on the first page of the document and signed by the employee. Whether or not a disclaimer is conspicuous is a question of law.

If the Senate's version prevails, handbook disclaimers may regain popularity.

Whether a handbook or other document constitutes an express or implied contract would depend on the presence of a conspicuous disclaimer signed by the employee.

To be conspicuous, the disclaimer must be underlined, in capital letters, and appear on the first page of the document.

**TO BE CONSPICUOUS,
THE DISCLAIMER MUST BE
UNDERLINED, IN CAPITAL
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THE FIRST PAGE OF THE
DOCUMENT. THE BILL
DOES NOT DESCRIBE THE
ACTUAL WORDS REQUIRED
FOR THE DISCLAIMERS, SO
EMPLOYERS WILL NEED
TO CAREFULLY CHOOSE
SUITABLE LANGUAGE.
WHETHER A DISCLAIMER IS
CONSPICUOUS, ACCORDING
TO THE SENATE'S VERSION
OF THE BILL, WOULD
BE A QUESTION OF LAW
DECIDED BY A JUDGE, NOT
A JURY.**

The bill does not describe the actual words required for the disclaimers, so employers will need to carefully choose suitable language. Whether a disclaimer is conspicuous, according to the Senate's version of the bill, would be a question of law decided by a judge, not a jury.

If signed into law, the bill could significantly reduce the risk of ordinary workplace documents unintentionally becoming extraordinary implied contracts.

As a result, the bill could decrease the likelihood of lawsuits alleging breach of contract, breach of a covenant of good faith and fair dealing, and similar claims, but would not likely change other employment-related claims like wrongful discharge.

The law would apply to handbooks, policies, and other similar documents issued after June 30, 2004.

Practical Impact

If the bill becomes law, then employers would face some choices beginning June 30, 2004. Between now and then, some of the issues that employers may consider include:

- How to revise handbooks and other documents to comply with the law;
- What to do with "old" handbooks, policies, and similar documents;
- When to issue or re-issue new handbooks, policies, or other similar documents;
- What to include in the disclaimer and how to make it conspicuous;
- How to handle the signature requirement and related recordkeeping issues; and,
- How to communicate policies in the future.

Conclusion

The employment-at-will doctrine remains in flux in South Carolina. Concerned by the risk of expensive lawsuits, some employers have re-worded or even eliminated written policies or procedures that otherwise provided helpful guidance to employees.

If signed into law, however, H.3448 could revive employee handbooks, promote employer-employee communication, and greatly reduce the risk of written communications becoming legally binding contracts.

Employers should carefully consider the potential benefits and new responsibilities that would arise under H.3448 between now and June 30, 2004 if the bill does, in fact, become law.

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