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Alejandro Valle, Esq.

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When Employment Handbooks and Contracts Attack: Unintended Consequences from Written Promises to Employees

By Alejandro Valle, Esq.

Many employers issue their employees handbooks with prominent disclaimer language stating that the handbooks should not be treated as contracts and do not create any contractual obligations between the employer and the employee. But these disclaimers, while important to include in such handbooks, do not always prevent the contracts they seek to prevent. If a handbook's language grants employees more rights than the law provides and employees rely on those expanded rights, then enforceable promises can result. Moreover, in situations where there is an actual employment contract in place, as opposed to a mere handbook, the employer must be careful to avoid unintended consequences from the provisions contained in the contract, even when such provisions are designed to protect the employer.

With regard to employee handbooks, several states - despite disclaimers - do enforce provisions in employee handbooks as binding contractual obligations in certain circumstances. In Indiana, for example, one employer unintentionally granted its employees an enforceable right to leave greater than normally allowed under the federal Family and Medical Leave Act (FMLA). *Peters v. Gilead Sciences, Inc.*, 533 F.3d 594 (7th Cir. 2008). In *Peters*, the employer's handbook stated that a 12-week leave period was available to "all employees" who were employed for at least 12 months and who worked at least 1,250 hours in the preceding 12-month period. This is very similar to the legal prerequisites for leave under the FMLA.

The FMLA does not, however, apply to employees of an

employer's worksite when there are less than a total of 50 employees working for that employer within 75 miles of that worksite (the so-called "50/75" exception). The employer, which would have fallen under the "50/75" exception, failed to include any language about that exception in its handbook.

The employee in *Peters* invoked the handbook's leave period following corrective surgery for a shoulder injury. During his leave, the employer filled his position with another employee, and upon the injured employee's return from leave, the employer offered him a different position, which he declined. His employment was then terminated. The Seventh Circuit (which covers Illinois, Indiana, and Wisconsin) held that the employee had no basis for a claim under the FMLA due to the 50/75 exception, but because the handbook had essentially offered a similar leave without mentioning any 50/75 exception, that leave could be enforced under a state law theory called "promissory estoppel" (which basically means a promise that may not otherwise be a contract is enforceable like a contract to the extent the person to whom the promise was made relied upon it to his detriment). Thus, even though the employee had no statutory right to leave under the FMLA and no actual employment contract, the employee had an enforceable right under state law to the extent he had relied upon the assertions made in the employer's handbook, and the employer could not take his position away because he utilized the leave they provided.

This approach to employee handbooks can favor employers in certain instances. For example, although Indiana employees are entitled to receive at least a pro rated share of any accrued vacation pay upon termination, Indiana courts have held that an employee handbook provision limiting employees' rights to accrued vacation pay upon termination are enforceable limitations on the rights employees using the handbook would otherwise have. *See, e.g., Williams v. Riverside Community Corrections Corp.*, 846 N.E.2d 738 (Ct. App. Ind. 2006).

Thus, it is not sufficient for employee handbooks to contain disclaimer language stating that the handbooks are not binding contracts because courts may look beyond such disclaimers to enforce specific provisions based on the circumstances involved. Employers should therefore be cautious when drafting employee handbooks and consider what rights they may be unintentionally creating based on the language in the handbooks.

What about in the actual employment contracts? Just as with handbooks, unintended consequences can result from using contractual language that is too broad. For example, in the recent case of *Rabe v. United Airlines, Inc.* 636 F.3d 866 (7th Cir. 2011), the Seventh Circuit held that a foreign employee working overseas could pursue a lawsuit against her employer in United States courts and under United States law, based on a contractual provision that stated the terms and conditions of her employment were governed exclusively by United States law and that United States (and Illinois) courts would have exclusive jurisdiction. This provision, intended to prevent the employer from being sued in foreign jurisdictions, was held to allow a foreign employee working outside of the United States to pursue a federal claim within the United States, despite

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the general rule that foreign employees working for American companies outside of the United States are not covered by American laws. (Please note, however, that American workers working abroad for American companies and foreign workers working within the United States for American companies are generally covered by United States employment laws, if such laws are otherwise applicable.)

Written promises between an employer and employee can have unintended consequences, even in an employee handbook that is not designed to be an employment contract or in an employment agreement provision actually designed to protect the employer. Anticipating every possible potential unintended enforceable promise may be impossible - after all, they are unintended for a reason - but cautious drafting with legal counsel will eliminate many potential pitfalls and aid employers in drafting the documents they intended to draft in the first place.

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