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Insight — 2/7/2013

Are you aware that an employee handbook can create an implied contract that may lead to a wrongful discharge claim by a terminated employee? Yes, of course you are. That is why you've included a disclaimer in your handbook that specifically states that it is not intended to create a contractual relationship with employees. Issue resolved, right?

Not necessarily. The Utah Court of Appeals recently ruled that, where handbook provisions suggest that certain employees are not "at-will" employees, language in the handbook disclaiming a contractual relationship is insufficient to defeat a former employee's wrongful discharge claim. (*Tomlinson v. NCR Corp.*, 2013 UT App 26.)

Handbook Policies Can Create an Implied Contract

Employers want to maintain an at-will employment relationship with their employees, meaning either the employee or employer may terminate the relationship at any time without notice or cause. If not properly drafted, however, handbook language can undermine the at-will relationship. Problematic policies include those that imply that employment may only be terminated for certain reasons or after following a specific procedure. Employee handbooks containing such language may create an implied contract of employment, which allows a terminated employee to assert a claim for wrongful discharge if the employer did not follow its policies.

In the recent *Tomlinson* decision, the Utah Court of Appeals focused on numerous provisions in the company's policy manual to rule that the manual constituted an implied contract that limited the company's right to terminate an employee, including:

- Distinguishing between a "core workforce" that performed ongoing work for the business and a "workforce buffer" that included temporary or tactical employees, contract personnel and vendors;
- A statement that the tactical workforce was considered at-will without a similar at-will statement for full-time, core employees; and
- A misconduct policy that required the company to notify employees of performance issues and mandated use of a performance improvement plan.

Not All Handbook Disclaimers are Effective

Tomlinson's employer argued that the manual did not create an implied contract because it contained a disclaimer which read, in part: "These guidelines are not intended to be contractual in nature, nor should they be interpreted as strict rules for responses to individual activity. The appropriate response to each situation may differ." The Court ruled that because the disclaimer did not specifically state that employment was at-will or otherwise define the employment relationship as voluntary, the disclaimer was not effective in overcoming other provisions that created an implied contract.

Employee Handbook Takeaways

Utah employers should review their employee handbooks and policy manuals to:

- Include a clear and conspicuous disclaimer, preferably at the front of the handbook, that specifically states that all employment is at-will and that the employee and employer may terminate the employment relationship at any time without notice or cause;
- Remove any mandatory procedures in misconduct, disciplinary or performance policies that may limit the company's flexibility to follow alternate disciplinary courses or to terminate at will; and
- Avoid classifications of employees that suggest some employees have a permanent status while other employees are probationary or temporary.

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