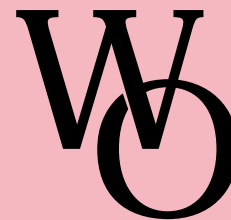

Wilson & Orcutt, P.C.

Business Law Newsletter



Wilson & Orcutt, P.C.
201 Great Road
Acton MA 01720

Two Thumbs Up For Employee Manuals

Well drafted employment manuals are a good way of communicating your policies and procedures to employees, and can also satisfy distribution and posting requirements under various statutes such as the new Massachusetts sexual harassment policy law. However, two recent Court decisions granted discharged employees the right to be reinstated, based upon the terms of their employee manuals. These decisions gave many employers an uncomfortable feeling, since they thought that employees could be discharged for any reason as long as they are categorized as employees at will.

The truth is that you can have your cake and eat it too; and you can have an employee manual and still have at-will terms of employment. You just have to be careful what you do and don't say in the manual.

In both of those cases, the Courts construed the manuals as becoming employment contracts, modifying the at-will terms of employment that would otherwise exist. In both cases, the manuals lacked disclaimers to the effect that they did not contain con-

tractual terms and that all employment was at-will. We believe that carefully drafted disclaimers will be enforced by the Courts, and recommend that the following language be prominently displayed at the front of your manual:

This manual contains a statement of benefits and personnel policies, and has been prepared in order to provide information and guidance to our employees. The Company reserves the right to change, add to or delete any of the provisions of these benefits and policies at any time. This manual is not a contract of employment. All employment with the Company is on an at-will basis. As such, you or the Company may terminate the employment relationship at any time and for any reason.

We also recommend that all employees be asked to sign a receipt for a copy of your manual which contains an acknowledgement that they have read all of it and understand that it is not a contract of employment. Finally, in your manual you should avoid the use of phrases such as "permanent employee" or "terms of employment".

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The Law Giveth and The Law Taketh Away

Now for the bad news. Even though your carefully drafted employment manual protects the at-will nature of your employees' employment, you should know that the rule that such employment can be terminated for any reason has many exceptions.

Even at-will employees cannot be fired for the following reasons:

Discrimination or Violation of Statute

All employees are protected from discrimination on the basis of race, color, religion, national origin, sex, age (40 or older), sexual orientation, disability or handicap. In addition, statutes such as the Family Medical and Leave Act and the Occupational Safety and Health Act (OSHA) affect your right to terminate covered employees.

Violation of Public Policy

There are strong public policies which prohibit firing an employee for refusing to follow an order to violate a law, or for taking advantage of certain rights, such as taking time off for jury duty, cooperating with a law enforcement investigation or filing a workmen's compensation claim. Also, you may not fire an employee on the verge of becoming eligible for a benefit such as a pension, solely for the purpose of denying the employee that benefit.

Union Activity

All private, non-supervisory employees have the right to act collectively in order to improve their bargaining position with their employees, and you cannot fire them for doing so.

The best way to avoid an unfair discharge lawsuit is to treat your employees fairly and in a manner consistent with formal personnel policies. When termination is the only avenue left, make sure that you have a complete record, documenting the reason for the termination, all prior violations and warnings. You should also maintain notes of all conversations, interviews and investigations concerning the termination. You may also consider asking the employee to sign an appropriate release form, prepared by experienced employment law counsel.

What's New Under The Insurance Sun

Many of the pages of this Newsletter have been dedicated to educating employers about the exploding reach of employees' rights, and we are constantly warning our business clients about new potential sources of lawsuits. We used to end almost all of those conversations with the final warning that the large damages that could face an errant employer "are not covered by your insurance". That isn't true anymore.

Various forms of special employment practices liability (SEPL) insurance are now available from many of

the largest insurance companies, and often at affordable rates. Some of these policies even offer risk management and loss prevention services.

However, you have to be careful, since these policies are not standardized, they differ widely in coverage, and many insurance agents have yet to learn all of the ins and outs of the policies they offer. For example, some policies exclude coverage for punitive damages, and some exclude coverage for claims arising from Reduction In Force layoffs.

The Battle Of The Forms Is Now Null And Void

A 1962 First Circuit Court of Appeals case known as the Roto-Lith case, interpreting the Uniform Commercial Code, established a principal of law, commonly referred to as the battle of the forms. Typically, a purchase order submitted to a supplier has a back page filled with numerous contractual provisions, all in small type. Such purchase orders are often responded to by order confirmations which have a back page filled with conflicting contractual provisions, also in small type. Nobody reads both sides of all the papers, and the Roto-Lith case said that in the case of conflicting provisions, the last word was the final word, giving the sender of the last form the literal power to rewrite the contract.

However, Roto-Lith has been overruled by a 1996 case, the Ionics case, in which the Court held that conflicting provisions contained in such a sequence of forms cancel each other out. Now, your contract may be much simpler than you thought, and it may be missing essential terms which you assumed to be in force.

We advise all business clients to review all of their purchase orders, confirmations, acceptances and invoices in light of this change in the law. We also strongly advise a thorough review of all of the documents typically used in transactions with regular vendors and customers. Most probably it will be to all parties' advantage to work out in advance the terms of each deal.

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The Facts About Fax and What About E-Mail?

We are often asked (and often ask ourselves) whether faxed copies of signed documents and e-mail messages suffice when the law requires a contract to be “in writing”, or a document has to be “signed”. The short, and unsatisfactory answer is that the law has not quite caught up with technology, and these are still unanswered questions.

There is a proposed statute now before the Massachusetts Legislature, called the Massachusetts Electronic Records and Signature Act, which would answer the question in the affirmative, and the National Conference of Commissioners on Uniform State Laws is considering a Uniform Act on Electronic Communications in Contracting Transactions. In addition, revisions are being drafted to the Uniform Commercial Code to accomplish the same thing. We will keep you advised of the progress of the state of the law in this area. In the meantime, we recommend that all important contracts concluded by fax or e-mail be followed up with original, hand signed copies.

Recommended Websites

You can access over 75,000 company profiles at <http://www.companiesonline.com> where you can search by name, industry or location.

Want tips on how to run your business? Check out www.smartbiz.com.

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EDITOR: DANIEL B. GREENBERG

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