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## TEN WAYS A HANDBOOK CAN REALLY HELP OR HURT YOU

An Employee Handbook is a critical management and communications tool which serves numerous purposes. Created and used effectively it can inform managers and employees, guide consistent management, and prevent legal problems. Written and used incorrectly, however, it will be a source of legal claims. On balance, having a Handbook is better than forgoing one out of caution.

### I. "AT-WILL" EMPLOYMENT

Minnesota is an "employment-at-will" state. Therefore, as a general rule, private employers may terminate the employment of their Minnesota Employees at any time and without notice, for any or no reason, except an illegal reason (such as a discriminatory reason).<sup>1</sup>

#### A. The Pine River Case

The case of Pine River State Bank v. Metille, 333 NW 2d 622 (Minn. 1983) established a major exception to the "at will" rule when it defined an Employee Handbook as a contract and required the Employer to comply with its provisions. In that case, the Minnesota Supreme Court first defined a Handbook as a **unilateral contract**, holding that failure of an Employer to follow discipline procedures contained in an Employee Handbook resulted in a breach of contract and damages owed to the Employee.<sup>2</sup>

In other words, the Employer in that case was surprised to learn that it had made a contract with its Employees when it adopted its Handbook, and that the terms of that contract were the promises contained in the Handbook.

This case is still good law.<sup>3</sup>

#### B. Elements Of A Unilateral Contract

According to the Court in Pine River and subsequent cases, the following four elements must be present for a Handbook to constitute a binding unilateral contract:

- (a) An "offer" that is sufficiently definite in form
- (b) Communication of the "offer" to the Employee
- (c) Acceptance of the "offer" by the Employee
- (d) Adequate "consideration" furnished by the Employee.

#### C. Communication And Acceptance Of The Offer Result In A Contract

In general, an "offer" which is definite enough in form can be communicated by intentional general distribution to Employees.

It is accepted, and adequate "consideration" is furnished by Employees who commence or continue to work after receipt of the offer. Modifications to existing policies, including the reduction to writing of policies formerly understood through

oral communication or mere practice, if definite enough in form, are as likely to be construed as “offers”, as are complete Handbooks newly distributed.

This means that an Employer who distributes a policy or entire Handbook containing definite commitments (and no indication that the Employer does not intend to be making an “offer”), can be bound by the promises contained in the Handbook.

In addition, we know through case law that:

- a) An “offer” must be more definite than the employer’s general statements of policy, and an entire document does not necessarily rise to the required level of definiteness merely because one provision does so.<sup>4</sup>

Many of the cases which Employers have lost in Minnesota are based on Handbook discipline procedures which are too definite. This result is understandable, since it occurs because Employees who have been terminated involuntarily are suing, claiming that the Handbook required more steps in the discipline process before they could be terminated. These plaintiffs have no remaining loyalty to or stake in the Employer.<sup>5</sup>

- b) The Employer may, in writing, reserve the right to amend or modify the provisions of the policy or Handbook, or to use discretion in determining when to apply a specific procedure.<sup>6</sup>

However, Employers may not depend on the mere reservation of the right to amend a policy. Amendments are effective only when Employers can prove that they were adequately communicated to Employees.<sup>7</sup>

This means that Employers must be prepared to prove receipt of revised policies or Handbooks. When they are unable to do so, a former policy or Handbook may be deemed to be the basis for the employment relationship as in the Feges case.<sup>8</sup>

- c) Language in any policy or Handbook may effectively disclaim that it is an employment contract, but courts will still test any claim of a contract on the basis of whether the contract elements (described above) are actually present between Employer and Employee. Therefore, any Handbook, whether or not its distribution is limited to management, may be held to be a contract as to Employees who actually received it.<sup>9</sup>

## II. HANDBOOK FUNCTIONS

Although an Employee Handbook presents a real problem for any Employer who is surprised to learn that it will be treated as a contract, Handbooks are useful tools which serve at least the following essential functions in any organization:

**A. Communicating Basic Policies and Procedures**

Depending on the Employer's approach to creating and implementing it, a Handbook can be a means of building or reinforcing community and loyalty in the workforce, or it may be merely a "fail safe" mechanism for ensuring that Employees have been notified of essential information.

In any event, it is a tool to ensure that line managers have the necessary information to apply the Employer's policies consistently.

**B. Communicating In Writing Policies And Procedures Which Otherwise Would Be Implemented Merely As A Matter Of Practice Or Through Oral Agreements**

Written communication of policies and procedures is a safeguard for the Employer to ensure (1) general understanding and lack of misunderstandings; (2) consistency in application; (3) a clear statement to explain personnel actions; and (4) a solid basis for arguing that inconsistent oral statements and practices do not reflect Company policy.

This is particularly important in large organizations and those with more than one location where local managers function independently. Inconsistent management is viewed by Employees as unfair management, often leading to claims of discrimination or other unfair treatment.

**C. Communicating Information For The Legal Protection Of The Organization**

Certain provisions ought to be contained in Handbooks for the legal protection of the organization, as well as for the utility of the information. These include the harassment/offensive behavior policy, the EEO policy, the FMLA policy (if applicable)<sup>10</sup>, the Employer's drug testing policy (if any)<sup>11</sup>, and summary plan descriptions for Employee welfare benefit plans, or references to their availability.

**III. HOW TO DRAFT THE HANDBOOK TO PREVENT PROBLEMS AND REAP THE BENEFITS OF GOOD COMMUNICATIONS**

Draft Handbook policies and procedures which tend to identify desired conduct of Employees, rather than promised conduct of management. Then ensure that all members of management thoroughly understand the policies and their roles in implementing them. Distribute the Handbook to all Employees, and obtain their acknowledgment of receipt. Specifically:

**A. Prominently Include A Disclaimer Of Contract**

As described above, a Handbook may form the basis for a unilateral contract when it is an "offer" held out by the Employer to be "accepted" by an Employee who chooses to remain employed under the terms described in the Handbook.

An Employer can prevent the formation of a contract in this way by making clear that the Handbook is intended only as a statement of policy and not as the basis

for a contract of employment. Courts have approved the use of a **disclaimer** for this purpose.<sup>12</sup> See a sample disclaimer, *Appendix A*.

**B. Include Only General Statements Of Organization Policy**

Detailed statements of policy and procedure are exactly the kind which may be treated as an “offer” upon which an Employee may rely in assessing whether to start or continue employment. This has most often worked to the disadvantage of Employers in the case of discipline policies. See examples of a “Good Discipline Policy” and a “Bad Discipline Policy”, *Appendix B*.

**C. However, Avoid Vagueness And Ambiguity In The Handbook Language**

To the extent that promises made are clear, Employees will have realistic expectations, and the Employer will have a reasonable chance of effectively implementing what is promised, avoiding incidents of breach.

Any unclear language will confuse Employees and managers alike, causing potential legal claims.

**D. Correct Gaps And Conflicts Among Policies**

These tend to occur most often among policies dealing with time off, including absenteeism policies. Ensure that all of these policies coordinate. For each kind of absence, clarify whether time off will be available or the absence excused, and whether the time off will be paid. For example, if you have a policy providing short term disability *pay* in the event of a qualifying medical leave; make sure that there is a coordinating policy providing *time off* for that medical leave.

**E. Be Careful In All References To Employees In The Handbook**

Guard against policies which tend to indicate that Employees may have a guaranteed term of employment. These policies work against basic “at-will” employment status. This means, for example, excluding any policy providing for “probation” or an “introductory period”. In reality, an Employee is “at will” before, during and after any “probation” or “introductory period”.

**F. Develop And Execute An Effective Communication Plan For The Handbook And Subsequent Revisions**

Ensure that managers understand the Handbook and their roles in implementing it. Ensure that Employees acknowledge receipt and understand how to address questions about the policies.

**G. Implement Exactly What Is Promised, Or Promise Only What Actually Exists**

This means implementing systems and controls to ensure consistency. These efforts will be rewarded. To the extent that the Handbook is treated as a legal contract, the Employer will be required to have provided exactly what is promised.

Also, establish systems to ensure regular updating, so the Handbook continuously reflects reality. Use a header or footer which reflects the date for each page. Put each policy on a separate page if necessary.

#### **IV. CHOOSING HANDBOOK PROVISIONS**

A Handbook which is not tailored to the particular Employer is much more a liability than a help. Borrowing a Handbook from another organization and implementing it without tailoring is always a mistake. Among the characteristics that affect whether a particular provision is appropriate are the following:

- Size of Employer
- Nature of the business
- Number of locations
- Public v. private employer
- Union v. non-union Employees
- Manufacturing v. service industry
- Location, for purposes of local ordinances.

## APPENDIX A

### SAMPLE DISCLAIMER

NO PROVISION IN THIS HANDBOOK IS INTENDED TO CREATE A CONTRACT BETWEEN THE COMPANY AND ANY EMPLOYEE, OR TO LIMIT THE RIGHTS OF THE COMPANY AND ITS EMPLOYEES TO TERMINATE THE EMPLOYMENT RELATIONSHIP AT ANY TIME, WITH OR WITHOUT CAUSE. THIS HANDBOOK IS A GENERAL STATEMENT OF POLICY, TO BE MODIFIED AND APPLIED BY THE COMPANY AT ITS DISCRETION.

## APPENDIX B

### GOOD AND BAD DISCIPLINE POLICIES

#### **Not Recommended**

The following, set forth by the Court in Pine River<sup>13</sup>, is the text of the Pine River State Bank discipline policy which caused that Employer liability. Note that the language makes definite promises, while the Handbook contains no disclaimer of contract.

#### Disciplinary Policy

In the interest of fairness to all employees the Company establishes reasonable standards of conduct for all employees to follow in their employment at *Pine River State Bank*. These standards are not intended to place unreasonable restrictions on you but are considered necessary for us to conduct our business in an orderly and efficient manner.

If an employee has violated a company policy, the following procedure will apply:

1. An oral reprimand by the immediate supervisor for the first offense, with a written notice sent to the Executive Vice President.
2. A written reprimand for the second offense.
3. A written reprimand and a meeting with the Executive Vice President and possible suspension from work without pay for five days.
4. Discharge from employment for an employee whose conduct does not improve as a result of the previous action taken.

In no instance will a person be discharged from employment without a review of the facts by the Executive Officer.

#### **Recommended**

Note that this policy provides guidance for both Employer and Employee, but does not obligate the Employer to a set course of action.

#### Disciplinary Action

Every employee at the Company is employed "at will". This means that we are free to terminate the employment relationship at any time for any reason. Disciplinary action may be taken by management in cases of violations of the policies set forth in this manual, or for any instance of conduct deemed inappropriate by management.

Depending upon the circumstances, disciplinary action may take any or all of the following forms, even on a first infraction:

- Oral or written reprimand
- Suspension with pay
- Suspension with or without pay, pending investigation
- Termination of employment

Good common sense and judgment on your part will make disciplinary action unnecessary. Should you be in doubt, consult this manual—or your Department Head.

## FIVE WAYS A HANDBOOK CAN REALLY HELP YOU

1. Communicating clear policies and procedures, so that management is consistent and Employees feel fairly treated.
2. Communicating legally significant policies for Employer protection against claims, including, for example, discrimination, harassment and FMLA.
3. Establishing rules of behavior for use in management, including, for example, absenteeism.
4. Establishing rules of behavior for use in defeating unemployment and other legal claims, when establishing Employee misconduct is important. <sup>14</sup>
5. Used as a basis for comprehensive management review of policies and procedures throughout the organization. This is done at the time when the Handbook is initially issued and when it is revised.

## FIVE WAYS A HANDBOOK CAN REALLY HURT YOU

1. Functioning as a contract and binding the Employer to its exact terms, with no flexibility.
2. Creating misunderstandings among managers and Employees by ambiguous or conflicting policies and procedures.
3. Communicating policies and procedures which the Employer doesn't follow.
4. Excluding policies and procedures required by law, such as Offensive Behavior/Harassment and FMLA policies.
5. Alienating Employees because of the manner in which the Handbook is adopted or communicated.

## ENDNOTES

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<sup>1</sup> Cedarstrand v. Lutheran Bhd., 263 Minn. 520, 117 N.W.2d 213 (1962).

<sup>2</sup> Pine River State Bank v. Metille, 333 N.W.2d 622 (Minn. 1983).

<sup>3</sup> Progressive Technologies, Inc. v. Shupe, 2005 WL 832059 (Minn. App.)

<sup>4</sup> Pine River at 630.

<sup>5</sup> See Pine River for one example.

<sup>6</sup> Pine River, 333 N.W.2d at 627; Lee v. Sperry Corp., 678 F. Supp. 1415 (D. Minn. 1987).

<sup>7</sup> Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701 (Minn. 1992).

<sup>8</sup> Id.

<sup>9</sup> Id.; Lee, 678 F. Supp. at 1418; Audette v. Northeast State Bank of Minneapolis, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989).

<sup>10</sup> See the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. and its Regulations, 29 CFR § 825.

<sup>11</sup> See the Minnesota Drug Testing Statute, Minn. Stat. §§ 181.950 to 181.967.

<sup>12</sup> Feges at 708.

<sup>13</sup> Pine River at 626.

<sup>14</sup> In relevant part, Minn. Stat. § 268.095, subd. 6 defines "misconduct" for purposes of entitlement to unemployment compensation in Minnesota, as follows:

"Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment. Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct." (Emphasis added.)