

EMPLOYERS: DO YOUR EMPLOYEE HANDBOOKS INVITE LAWSUITS FOR WRONGFUL TERMINATION?

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If you are comfortably resting on the belief that you can discharge your employees for any or no reasons, due to the at-will nature of employment in Colorado, perhaps it is time to take a close look at your employee handbook. **COLORADO JURIES HAVE AWARDED VERDICTS RANGING FROM HUNDREDS OF THOUSANDS OF DOLLARS TO MORE THAN 2 MILLION DOLLARS FOR BREACH OF CONTRACT ARISING FROM A HANDBOOK.** This article will present an overview of Colorado decisions addressing contracts arising out of employee manuals, even in those situations where the employee is advised, and agrees to, the status of an "at-will" employee, subject to termination at the whim (or discretion, with or without reason) of the employer. **This article is not designed to provide legal advice or render legal opinions for specific situations. For specific legal questions, contact the attorney of your choice. If you wish to consult with the author on any matter relating to Colorado employment issues, you will be advised of the fee basis for such consultation.**

HOW CAN AN EMPLOYEE HANDBOOK ALTER "AT-WILL" EMPLOYMENT STATUS?

The general rule in Colorado is that, unless there is an explicit understanding to the contrary, every employment relationship is presumed to be "at-will," which means that either the employer or the employee may terminate the relationship at any time, without notice and without cause. Colorado courts have held that despite the presumption of "at will" employment, under certain circumstances, the existence of such an "at-will" relationship may be rebutted, and the employee may demonstrate that the termination of the employment relationship is subject to certain restrictions. Such demonstration must consist of proof that the employer made statements to the employee, as in an employee handbook that the employer had distributed, and that those statements, as well as the circumstances under which they were made, and the employee's reaction thereto, constitute an offer by the employer of something other than "at-will" employment, and the acceptance of that offer by the employee.

Our courts have held that even if the requirements for the formation of a contract cannot be shown, the employee may demonstrate that conditions have been imposed upon the "at-will" relationship, based upon statements made by the employer which are sufficient to invoke the doctrine of "promissory estoppel." The doctrine of "promissory estoppel" applies if an employee can demonstrate that the employer should reasonably have expected the employee to consider the employee manual, or other employee communications, as a commitment from the employer to act in a certain manner with regard to the employment relationship, with evidence that the employee reasonably relied on the commitments to his detriment, and that injustice can be avoided only by enforcement of the procedures requiring the employer to act in the manner to which it committed.

Examples of the above include termination procedures contained in an employee handbook, whereby the employer promised to use certain termination procedures before terminating an employee, or to use a standard of not terminating without "just cause." Such provisions have been held to be binding upon the employer even though the handbook contains a disclaimer of anything but "at-will" employment. It has been held that if a supervisor agreed to grant a medical leave to an employee, with a promise of reemployment at the end of a specified period, such promise would be enforceable, despite the existence of a disclaimer in the employee handbook. In a case where the employee handbook provided for a progressive discipline procedure, the court found such procedure might be mandatory based upon testimony of managers that they regarded the termination procedures to be mandatory. The court held that in the face of conflict between the handbook disclaimer and the testimony of managers as to the policy of the company, a factual question was presented requiring resolve by a jury, as the trier of the facts.

WHAT IS THE EFFECT OF A DISCLAIMER IN THE EMPLOYMENT HANDBOOK?

If there is a conspicuous disclaimer of anything other than employment "at-will" in the handbook, which is emphasized and clearly indicates that the employee handbook was not intended to create a binding obligation, the employer may be able to escape a finding that a contract was entered into or that the doctrine of "promissory estoppel" applies. The odds increase for the employer's position if the employee, at the time of hire, signs beneath a proper and conspicuous disclaimer, acknowledging that the employment is at-will and may be terminated by either the employer or employee at any time. The disclaimer must clearly and conspicuously disclaim the intent to enter into a contract limiting the right to discharge employees. However, there are actions that an employer may engage in which undercut the effect of a disclaimer.

Careful analysis must accompany the employer's distribution of policy procedures subsequent to the issuance of its employment handbook. Similarly, care must be exercised by supervisory personnel in making promises or giving assurances to employees about procedures which may not be clearly delineated in the handbook. Our courts have held that if the evidence is conflicting as to whether the employment was meant to be something other than "at-will," or if the evidence would admit of more than one inference, and one view of the evidence would support the existence of an employment contract not terminable "at-will," the issue must be decided by a jury. From an employer's standpoint, that is the least desirable course, as the employer is not only subjected to possible liability upon a jury verdict, but the legal costs in defending the claim through a jury trial will increase dramatically over the costs of a resolve through a pre-trial motion which sustains a valid disclaimer.

AMOUNT OF RECOVERY

What are the potential damages faced by an employer whose actions or handbook language result in an exception to the doctrine of employment "at-will?" If the evidence supports a finding of liability, the employee may recover the salary and benefits that would have been earned, but for the discharge. In certain cases, if supported by the facts, the employee may recover damages for emotional trauma, and attendant physical suffering, punitive damages, and court costs. Unlike the Federal civil rights laws, an employee, except in rare circumstances, is not entitled to recovery of attorney fees based on a wrongful discharge claim founded solely upon the existence of a contract or facts rising to the level of implying the existence of a contract under a "promissory estoppel" theory.

CONCLUSION

The ability to defend against a claim for wrongful discharge involves analysis of multiple factors, specific to each case. Many of these factors have not been discussed in this article. However, a properly drafted employment handbook may often discourage the filing of such a claim, or, if filed, may result in a pre-trial disposition without the expense of trial. Learn more about the proper drafting of an employment handbook by selecting a competent lawyer to represent you.

[Nathan Davidovich](#) practices employment law in the State of Colorado, and is available to review or draft employment handbooks or policies and to consult on other employment issues arising in the State of Colorado. In addition to consulting on employment handbooks and policies, Nathan Davidovich and members of the firm of [Kennedy, Childs & Fogg, P.C.](#) are available to speak and consult at management seminars throughout the world to help employers avoid violating federal and state anti-discrimination laws.

ADVANCE PLANNING MAY SAVE YOU THOUSANDS OF DOLLARS AND AN ADVERSE JUDGMENT. ACT NOW TO HAVE YOUR CURRENT EMPLOYEE HANDBOOK REVIEWED OR A NEW ONE DRAFTED.

FOR A REVIEW OF YOUR CURRENT EMPLOYEE HANDBOOK OR THE DRAFTING OF A NEW ONE PLEASE CONTACT NATHAN DAVIDOVICH BY EMAIL AT nathandavidovich@talk-law.com, by telephone AT (303) TALKLAW/(303) 825-5529,or by fax at (303) 265-9797.

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