

EMPLOYERS: CAN YOU REDUCE THE RISK OF LAWSUITS FOR WRONGFUL TERMINATION BY INCLUSION OF INTERNAL GRIEVANCE PROCEDURES IN EMPLOYEE HANDBOOKS?

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In today's complex business world, employers often publish employee manuals or handbooks. Such handbooks or manuals may provide the lynchpin for an employee to file a suit against the employer for wrongful discharge in violation of the "contract" provisions in the handbook. Colorado is an "at-will" employment state, which means that an employee can be fired for any reason or no reason, except one that is violative of law or contract. Why then should an employer provide, in such a manual, contract provisions that weaken the "at-will" provisions of law? One of the answers is that the Human Resource functions of today's corporations need to provide guidelines to employees of what is expected. Extreme care must be exercised in the drafting of such manuals to lessen the likelihood that the manual is interpreted as altering the "at-will" status that you, as an employer, may expect.

However, there is one advantage that a properly drafted handbook can achieve. It can lessen the likelihood of a discharged employee suing for wrongful termination, in breach of contract provisions. The way of accomplishing this is to incorporate in your handbook a mandatory internal grievance process that must be followed by the employee before resorting to filing suit in court. This will be beneficial in cases brought alleging wrongful discharge in breach of contract provisions. The implementation of a mandatory internal grievance process makes sense, considering that in the past, Colorado appellate courts have affirmed judgments against employers for breach of contract in varying amounts. These include \$2,371,028, (McIlravy, et al. v. Kerr McGee Coal Corporation, 204 F. 3d 1031 (10th Cir. 2000)), \$557,000, (Vanderhurst v. Colorado Mountain College District, 208 F.3d 908 (10th Cir. 2000)), and \$571, 144 (reduced to \$121,144), (Powell v. COBE Laboratories, Inc., 2000 U.S.App. LEXIS 3235 (10th Cir. 2000)). The incentive to avoid exposure to these types of awards requires careful consideration and implementation of an exclusive internal grievance process, whereby employees must first follow all of the internal steps before filing a lawsuit.

Failure to follow these steps to their conclusion has been held to bar an employee's claim for discharge in violation of the contractual provisions of the Employee Handbook. Even after completing the process, the employee will be limited to a lawsuit alleging deficiencies in the way the employer administered the internal grievance procedure, such as that the decision of the hearing officer resulted from policy violations.

This issue was discussed by the United States Court of Appeals for the Tenth Circuit (McGuire v. Continental Airlines, Inc., 210 F. 3d 1141 (10th Cir. 2000)). A jury verdict of \$200,000 in favor of a terminated employee was reversed. This case involved a four step disciplinary process, consisting of (a) a verbal warning; (b) a written warning; (c) a termination warning; and, (d) termination. The employee partially appealed the termination via an internal company grievance. However, without completing all of the internal grievance steps, the employee chose to file suit in Federal Court. The Court reiterated that Colorado follows the doctrine of employment at-will, meaning that termination does not give rise to a cause of action. (See Crawford Rehabilitation Servs. v. Weissman, 938 P.2d 540, 546 (Colo. 1997)). The Court then pointed out that an employer can bind itself by distributing an employee handbook containing progressive disciplinary procedures to be followed prior to termination, which can then be enforced by a discharged employee under a theory of breach of implied or express contract. The Court, in ruling that the case should have been dismissed and not gone to a jury, ruled that, "Ordinarily, an employee must seek to exhaust an employer's exclusive internal grievance process before seeking judicial relief, and if the grievance procedure is the exclusive remedy then it must be exhausted, prior to seeking judicial relief."

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 and experienced lawyer to represent you.

Nathan Davidovich, an attorney with more than 40 years of experience, practices employment law in the State of Colorado. He is available to assist you or your counsel in the review or drafting of employment handbooks or policies, to consult on other employment issues, and to speak and consult at corporate seminars throughout the world to help employers avoid violating federal and state antidiscrimination 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
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