

# **Employee Handbooks in Massachusetts: Benefits, Pitfalls and Preserving At-Will Employment**

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## **I. Why Have An Employee Handbook**

Many discussions of employee handbooks focus exclusively on the perils associated with having one. While these risks should not to be overlooked or understated, it is important to understand the many benefits of having in place an effective employee handbook. Some of the most important benefits of a high quality handbook include:

- **Communication.** Handbooks should allow employees and managers to know what is expected of them and what they can expect. All too often, workplace conflicts, employee dissatisfaction and poor performance are the consequence of misunderstandings or a lack of clarity about company policies, procedures or practices. An effective handbook can go a long way in improving communication and eliminating ambiguity and uncertainty. This helps to support positive relationships, constructive dialogue, team building and healthy workplace morale.
- **Consistency.** Handbooks should provide a centralized and uniform source of information about employment policies, procedure and practices, thus eliminating confusion and supporting consistent enforcement. Frequently, inconsistent enforcement of workplace

policies, procedures and practices results in perceptions of unfairness among employees which can lead to dissatisfaction, conflict, grievances and costly legal claims. An effective handbook eliminates the need to “reinvent the wheel” and promotes good decision-making and good management. As a result, less time and resources are wasted handling conflicts and crises. In addition, with consistent enforcement of consistently communicated policies, employers can reduce the risk of legal claims.

- Compliance. Employers are required by state and federal law to provide employees with policy statements on various issues such as equal employment opportunity, sexual harassment, family and medical leave, wage and hour matters, and a number of other topics, depending on the size of the workforce, type of business and other considerations. Employee handbooks provide a convenient and appropriate vehicle for communicating such policies to your entire workforce in compliance with applicable laws. (Importantly, not all employers are subject to the same requirements. Employers are advised to consult with employment counsel to determine their legal obligations.)
- Protection. While no amount of judicious drafting can eliminate entirely the risk of lawsuits, a handbook that is well conceived, well drafted, regularly updated and consistently enforced can

reduce your risk of lawsuits and may provide the best defense to a range of employment related legal claims such as contract, discrimination and wrongful discharge claims.

## II. Creating Your High Quality Employee Handbook

While it is tempting for an employer to put into place quickly and cheaply one of the myriad of employee handbooks available on the internet, from business associations and elsewhere, to do so is a grave mistake. In most cases, it is better to have no handbook at all rather than a handbook that has not been thoughtfully prepared and maintained for your particular organization. For a handbook to accomplish its purpose and for you as the employer to reap the benefits outlined above, it is essential that your handbook be tailored to the needs and characteristics of your business and reviewed on a regular basis by qualified counsel.

A high quality handbook must be thoughtfully conceived and carefully drafted, with knowledge of the law and knowledge of your organization. Considerations that are pertinent to creating an effective, high quality handbook include, among other things, type of business, nature of industry, size of workforce, workforce profile, workplace culture and current personnel policies, procedures and practices.

A low quality handbook may contain provisions that are in violation of local, state or federal laws, or may impose on your business obligations that are cumbersome, costly and unnecessary. With a poorly crafted handbook you may

find that you have made promises you never intended. A low quality handbook can create confusion and conflict, waste time and resources, and produce employee dissatisfaction and perceptions of unfairness that can lead to legal claims, lawsuits and liability.

Experienced employment counsel can work with you to insure against the following common problems:

- Unlawful provisions, provisions that inaccurately describe applicable law, or provisions that accurately describe inapplicable law.
- Provisions that inadvertently create binding promises.
- Provisions that are excessively discretionary, inviting disparate treatment and claims of unlawful discrimination.
- The “tail wagging the dog syndrome” that occurs when handbook provisions burden your business with unnecessary policies and overly complicated procedures.
- The “bottom drawer syndrome” that occurs when your handbook is not user friendly or is inconsistent with the actual day-to-day policies, procedures and practices of your business.

### III. Reducing the Risk of Legal Claims, Lawsuits and Liability

The main legal pitfall associated with employee handbooks is the increased risk that an employee will claim that the employer’s handbook is an express or implied contract limiting the employer’s ability to terminate the employee or creating other

contractual obligations. Thus, when drafting an employee handbook, care must be taken throughout to retain the employer's discretion, preserve the at-will employment relationship and avoid unintended legal obligations.

As described in greater detail below, employers have attempted to avoid the consequences of handbooks being construed as legally binding contracts by, among other things, including disclaimers in the handbook that the policies contained therein do not constitute enforceable obligations. However, in 1995, the Massachusetts Supreme Judicial Court indicated its reluctance to “permit management to reap the benefits of a personnel manual, while at the same time, avoid promises freely made in the manual that employees reasonably believed were part of their arrangement.” O'Brien v. New England Telephone and Telegraph Co., 422 Mass. 686,694 (1996). This reluctance to allow employers to have their cake and eat it too when it comes to handbooks has continued into the 21<sup>st</sup> century, with courts carefully scrutinizing the content of handbooks and the manner in which distribution and enforcement are handled to determine if the handbook contain legally binding obligations. The following sections describe some of these cases and what employers can do to reduce their risks of lawsuits and liability.

A. Preserving At-Will Employment

Massachusetts is an “at-will” jurisdiction. This means that employers can terminate their employees without or without cause, without notice, for any reason not in violation of the law or a clearly established public policy. Upton v. JWP Businessland, 425 Mass. 756, 757 (1997). Generally, when an employment contract contains no definite period of employment it establishes employment at will. Jackson v. Action for

Boston Community Development, Inc., 403 Mass. 8, 9 (1988). In addition to following the recommendations set forth in the final section of this article, there are several critical steps that you can take in your handbook to preserve your company's at-will relationship with its employees:

- Be clear. Include a bold-faced statement on the first page of the handbook stating that all employees are at-will. This statement should be reaffirmed in other sections of throughout the handbook. (A sample comprehensive disclaimer containing at-will language is set forth below in the *Recommendations* section of this article.)
- Do not use any language that directly or implicitly states a length or term of employment. Never refer to employees as “permanent” even when attempting to distinguish them from temporary employees. A better term is “regular” or simply full-time or part-time employees. Similarly, do not use the term “probationary employee” and eliminate all references to “probationary periods” as this suggests that employees who successfully complete their probationary period can only be terminated for cause.
- Salaries should be on a weekly or bi-weekly basis, never on an annual basis, and employers should not promise yearly or annual promotions, holiday bonuses, evaluations or salary increases without appropriate qualifiers.
- Do not state or imply that employees are subject to dismissal for good, reasonable or just cause only. If an employer wishes to

provide a list of reasons for discipline or termination, it should indicate that the list is not exhaustive and expressly retain the discretion to terminate an employee for any reason at any time.

- Do not promise to follow any mandatory process prior to termination or to adhere to inflexible procedures for handling grievances. Consider keeping policies on these issues to a minimum and providing separate training for managers and supervisors on how to implement them

B. Avoiding Common Mistakes

1. The Law

The basic framework of do's and don'ts for avoiding legal liability in connection with employee handbook contract claims was first set forth in Jackson v. Action for Boston Community Development, 403 Mass. 8 (1988). In that case, the Supreme Judicial Court rejected a claim that an employer was contractually obligated to follow the terms of a progressive discipline procedure set forth in its employee handbook before terminating an employee. The Court relied on the following factors in reaching this conclusion:

- The employee handbook reserved the employer's right to modify it;
- The employee handbook stated that it was for "guidance" only;
- The parties had not negotiated the handbook's terms;
- The employee had not signed the handbook or in any other way manifested assent that he understood or agreed with its contents;

- The handbook did not state a term of employment, nor were there any other documents indicating that the employee was other than an at-will employee;
- There was no evidence that the employer had drawn any special attention to the handbook.

Jackson v. Action for Boston Community Development, 403 Mass. at 14-15.

The Jackson case still is viable in Massachusetts and provides the starting point for most court's analyses of employer liability in the handbook context. However, seven years after Jackson was decided, in O'Brien v. New England Telephone and Telegraph, the Supreme Judicial Court stated that the absence or presence of any of the factors it had set forth in Jackson was not dispositive of whether or not an employee manual constituted an express or implied contract. Thus, even though the plaintiff in O'Brien had not negotiated the terms of the handbook or signed it, the Court concluded that the handbook, in which the employer had not retained the right to modify, gave the employee the right to expect that she would be entitled to the progressive discipline steps provided in the employer's handbook. Notably, however, because the manual also contained a grievance procedure, which the plaintiff did not follow, the Court ultimately dismissed the claim. The Court reasoned that an employee "cannot assert a right against unfair treatment under one part of her employment contract and fail to follow procedures set forth in another part of that contract that could provide relief from that unfair treatment." 422 Mass. at 495. While the manual was at the root of the problem in O'Brien, it proved ultimately to also be the cure. Only, however, after protracted, costly and time consuming litigation.



Unfortunately for employers, without abandoning them entirely, the Appeals Court has continued to step away from a strict application of the Jackson standards. In Ferguson v Host International, Inc., 53 Mass App. Ct. 96 (2001), as in O'Brien, the Court focused on whether an employee could reasonably believe that his employee handbook contained enforceable promises. Although the handbook in the Ferguson case contained a disclaimer asserting that it was not a contract and reserving the employer's right to amend or cancel the handbook without notice, the Court opined that this language was the "functional equivalent of fine print" that was "buried in the general introductory portion of the manual, in a section not as likely to attract the employee's attention as the very specific lists of obligations and benefits set out in the manual." 53 Mass. App. Ct. at 103. As a result, the Court concluded that the disclaimer did not shield the employer from the contract claim, and the employee prevailed in his wrongful termination case against the company.

A recent Superior Court case produced a similar result. In Ortega v. Wakefield Thermal Solutions, Inc. 20 Mass. L. Rptr. 337 (2006), the employee handbook, which contained a progressive discipline policy, also contained a broadly worded disclaimer that the policies and procedures contained in the handbook were not terms or conditions of employment or a contract, and that the handbook itself was not a contract or an offer to create a contract. Ortega signed an acknowledgement that he had received the manual and that he was expected to read, understand and adhere to the employer's policies.

The employer summarily terminated Ortega when he came back from vacation several days later than planned. Ortega sued, claiming breach of contract based on the handbook's provisions. The employer moved for summary judgment, arguing that the

disclaimers contained in the handbook made it clear that the progressive discipline policy was not legally binding. The Court rejected the employer's argument, noting that the presence of a disclaimer does not necessarily defeat an employee's claim that the handbook constitutes enforceable contract. Based on the acknowledgement that Ortega had signed, the Court held that a jury could find that Ortega had relied on the manual as a "condition of his continuing employment."

In a strongly worded passage, the Ortega Court stated, "a jury could find that the manual is deceptively written by the employer, informing the employee that he has rights but only if the Company agrees to give them to an employee at the time he needs these rights." The Court suggested, however, that had the progressive discipline procedure itself contained a statement reserving the employer's right in certain situations to discharge an employee without going through the steps of progressive discipline policy, the case might have been decided differently.

Another very recent Superior Court decision demonstrates that, depending on the circumstances, some disclaimers can still be effective. In Peters & Cleveland v. Equiserve, Inc., 20 Mass. L. Rptr. 620 (Mass. Super. Ct. 2006), the Court concluded that an employer was not legally bound to adhere to a handbook provision prohibiting supervisors from listening in on employees' conversation where: 1) the handbook clearly indicated that it was not a binding contract; 2) the plaintiff had not negotiated any terms of the handbook; 3) the handbook stated that it was only intended to serve as a guide and a general overview of the benefits and policies; and 4) the employee were not required to acknowledge, assent to, or sign the handbook. Under those circumstances, the Court

concluded that it would be unreasonable to regard the handbook as a binding commitment.

## 2. Recommendations

The foregoing cases demonstrate that strict adherence to the Jackson factors is not a magic bullet for avoiding liability, but the Jackson factors continue to provide useful guidance nonetheless. Employers interested in maximizing the benefits and minimizing the risks associated with employee handbooks should work with qualified counsel in creating their employee handbook and have counsel review the handbook and update it periodically.

Smart employers should also re-read their handbook from time to time and ask themselves, as the courts in O'Brien and Ferguson did, whether a reasonable employee would conclude that it contained legally binding promises. If the answer is yes, employers should then ask themselves whether they are willing to adhere to those promises. If they are not, then the provision(s) must be modified or eliminated entirely.

The following is a summary of the basic steps employers should consider taking when drafting and distributing employee handbooks to avoid inadvertently creating a legally enforceable contract:

- Do not negotiate with employees over any term in the handbook.
- Do not call undue attention to the handbook while hiring. Interviewers should not show it to potential hires or discuss its terms because this may give the impression that the handbook provides contractual terms of employment. Handbooks should be given to employees only after an offer of employment has been made and accepted.

- Include a strong disclaimer in a prominent location in the handbook, preferably on the first page, in bold-faced print. This disclaimer should affirm employees' at-will status. It should also state that the handbook is not a contract, but rather a general guide to internal policies. The disclaimer should also clearly preserve the employer's right to modify the policies contained in the handbook at any time.

The following sample disclaimer includes these points:

*This handbook is only a general guide to Company policies. Because no two employment situations are ever exactly alike, Company policies must have some flexibility. The Company, in its sole discretion, may modify the policies summarized here on those occasions when it determines that particular circumstances warrant individualized consideration.*

***The language of this handbook is not intended to create a contract between the Company and its employees.** Although we value our employees and look forward to a continuing and mutually satisfactory employment relationship with you, it is understood that neither you nor the Company is obligated to continue that relationship if, at any time, or for any reason, either of us does not wish to do so.*

***All employees are "at-will."** This means that that you have no contract for any definite term of employment with the Company. Both you and the Company are free to terminate the employment relationship at any time. The "at-will" nature of your employment may be changed only by a written agreement signed by you and the [authorized representative] of the Company.*

*This handbook reflects Company personnel policies and practices and employee benefits in effect at the time the handbook was prepared. The Company retains the right to make changes to this handbook from time to time, as it deems appropriate, including the right to delete or suspend any or all of the policies, practices and benefits contained in this handbook.*

- Do not require employees to sign the handbook itself. Even separate acknowledgements of receipt may be risky if they contain language indicating that the employee has read the handbook, or is expected to read and understand its

contents. It may be a better personnel practice for the employer to maintain a separate log indicating to whom the handbook was distributed and when.

- Have employees sign a separate statement acknowledging that the handbook does not create any contractual obligations and that their employment is on an at-will basis.
- Do not include in your handbook any policies that are intended as enforceable contracts such as non-competition, non-solicitation, confidentiality or trade secret agreements.
- Do not include any policies in your handbook that your company is unwilling or unable to enforce.
- Enforce the policies, procedures and practices in your handbook consistently, fairly, and in good faith. When in doubt, ask your employment counsel for guidance in handling tricky situations.

#### IV. Conclusion

To maximize the benefits of having an employee handbook, avoid common mistakes and reduce your risk of legal claims, lawsuits and liability, your handbook should be:

- Tailored to the characteristics of your business, workforce and workplace culture.
- Thoughtfully conceived with knowledge of your company' day to day policies, procedures and practices.
- Carefully drafted with knowledge of the law.
- Consistently enforced.
- Regularly reviewed and updated.

Smart employers have a great deal to gain by adopting and maintaining an effective, high quality employee handbook.