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Employers: Be Careful What You Include in a Handbook

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Most employers include provisions in their Employee Handbook giving them the right to modify the policies at any time. They also make clear that the handbook is not a contract and does not create contractual obligations. There are good reasons for both, but also consequences. If you are looking to enforce an obligation, it's best to put it in a contract, not a handbook. A recent federal appellate court decision brought home that lesson in the context of an arbitration agreement.

Wise employers will include language giving them the right to modify a handbook's provisions since both the applicable law and the business needs of an employer frequently change. Such language helps temper employee expectations by alerting them that policies may change in the middle of their employment. Likewise, affirming that a handbook does not create contractual obligations gives employers the flexibility to deal with changing workforce needs and circumstances.

But employers must keep in mind that such disclaimers mean that the provisions of a handbook are also not binding on employees. A basic principle of contract law is that a legally binding contract is formed when there is "mutuality of promises"—meaning that both sides are obligated to perform an act. In other words, one side promises to do something in exchange for the other's promise to do

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another thing. But when only one side is bound to perform while the other reserves the right to renege or change their mind on that promise—then courts find such promises to be "illusory"—and they do not create a legally binding contract. The handbook essentially says: "we expect you (employee) to follow these rules and policies, but we (the employer) do not guarantee that we will do the same; we reserve the right to change the rules during your employment." That premise undercuts the notion of a binding contract.

Thus, if an employer wants to enforce an agreement with an employee, the employer should have a separate written agreement, and not include it in a handbook acknowledgment receipt. That was the lesson learned from a recent appellate court decision, in which the court held that an arbitration agreement included in a handbook was not enforceable because of "illusory" language contained in the Acknowledgement Receipt of the Handbook. In the Acknowledgement Receipt the employee acknowledged having read and understood the handbook and specifically acknowledged certain policies and agreements, including an agreement to submit all employee disputes to arbitration. The Acknowledgement Receipt went on to say:

> I further acknowledge my obligation to read and comprehend its contents. I understand that this handbook is intended as an employee reference source regarding personnel policies, procedures and company benefits of the employer, but may not represent all such policies currently in effect. *I further understand that the employer has the right, from time to time, to make and enforce new policies or procedures and to enforce, change, abolish or modify existing policies, procedures or benefits applicable to employees as it may deem necessary with or without notice.* I also understand that my employment is terminable-at-will, that I am not being employed for any specified time, and this handbook is not intended to and does not create

> a contract of employment. As a condition of my employment, I agree to conform to any such policy, rule, or regulations, whether currently in effect or established in the future.

When a group of employees subsequently sued the employer for payment-related claims, the employer moved to compel arbitration and to dismiss or stay the proceedings because the employees had signed the Acknowledgement Receipt, which specifically acknowledged the section titled "Agreement to Submit All Employment Disputes to Arbitration." However, the employees argued that the Arbitration Agreement was an illusory promise because in the Acknowledgement Receipt the employer retained the right to change, abolish or modify the entire handbook, which included the Arbitration Agreement. The employer countered that this "modification" clause did not apply to the Arbitration Agreement because it was not included within Arbitration Agreement itself. Instead, the "modification" language was only found in the Acknowledgement Receipt. As such, the employer argued that it did not have any right to modify the Arbitration Agreement. However, the court sided with the employees, finding that the Acknowledgment Receipt—which contained the modification clause—was part of the Arbitration Agreement since the Arbitration Agreement expressly referenced the Acknowledgment Receipt. Because the modification clause stated that it applied to the handbook as a whole without exception, the Court determined that the modification language must also apply to the Arbitration Agreement, thereby making the Arbitration Agreement illusory and unenforceable under the contract law of the state of Maryland, which was the applicable law in the case and where the case was brought.

This case serves as a warning to employers that they may not be able to enforce employee obligations where they are only included in a handbook, even if the employee signs an acknowledgement of receiving the handbook. While it may be easier to

have employees (new and current) sign only one document indicating acceptance of the employer's policies and terms of employment, in doing so employers run the risk of not being able to enforce certain obligations in a court of law.

A general rule of thumb: If you, as an employer, would like to legally bind an employee—for example, to arbitrate future claims or keep certain information confidential after termination of employment—then you should consider asking employees to sign a separate stand-alone agreement that does not refer to the handbook or contain modification language or disclaimers that undercut the existence of a contract. For assistance in drafting handbooks or standalone employment agreements, contact your Akerman attorney.
