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NJ Employers: Mind Your At-Will Disclaimer Language

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We are all familiar with the concept that, generally, absent a contract, employment in New Jersey is at-will, meaning an employer can terminate an employee with or without cause or notice. *Bernard v. IMI Sys., Inc.*, 131 N.J. 91, 106 (1993). An exception exists where an employer issues a handbook that contains express or implied promises concerning the terms and conditions of employment, without clear and prominent contractual and at-will disclaimers. *Witkowski v. Thomas J. Lipton*, Inc., 136 N.J. 385, 393 (1994). In determining whether an employee manual creates an implied contract, the key consideration is the reasonable expectation of employees. *Id.*

Given the risk associated with creating contractual obligations vis-à-vis employee handbooks, some employers instead rely upon discrete stand-alone policies. The importance of incorporating disclaimers in those policies was recently highlighted in a March 2015 New Jersey Appellate Division case. There, rather than a handbook, the employer had a progressive disciplinary policy, which stated as follows:

> "[Employer] believes in progressive corrective discipline. Therefore, in most cases of policy violation, the approach to improvement will be taken in two or more steps with discharge as the final step when corrective measures fail.
>
> Certain violations will result in discharge without prior warnings or corrective attempts. Even minor infractions, if repeated, may lead to discharge. [Employer] reserves to its sole discretion the use of progressive discipline.
>
> The disciplinary steps are not rigid. An employee may be informally or formally counseled as often as believed necessary, may be put on disciplinary probation or may be suspended without pay more than once.
>
> Discharge must be supported by a written summary of the facts that support the recommendation for termination of employment. No employee will be discharged without approval of the Director of Human Resources."

The employee in the case was terminated for engaging in repeated verbal altercations with co-workers. She filed a one-count complaint alleging that her employer wrongfully terminated her employment in violation of its discipline policy. While the court did not expressly reach the issue as to whether the disciplinary policy created an implied contract (because the employer, in fact, followed the policy), it noted that the disciplinary policy sets forth a "loose structure for employee discipline, and thus presents a weak but *cognizable* basis for finding that the policy created an implied contract. Although the policy reserves to defendant's 'sole discretion' the use of progressive

discipline, and only roughly outlines the disciplinary procedures that defendant 'may' apply, it lacks clear and prominent disclaimer language, and never confirms at-will employment." (emphasis added).

Contrast the above language with another recent employee handbook case, where the court found there was no employment contract: *Marrin v. Capital Health Systems*, 2015 WL 404783 (D.N.J. Jan. 29, 2015). There, the handbook stated, in bold font, on its own page, at the beginning of the handbook: "No one is authorized to provide you with an employment contract or special arrangement concerning terms or conditions of employment unless the contract or arrangement is in writing and signed by the Chief Executive Officer or designee. You or Capital Health may terminate your employment with Capital Health at any time with or without cause or notice." The handbook acknowledgment contained similar language, in capital letters. The court also pointed out that the progressive discipline policy in the Capital Health handbook contained its own disclaimer: "Capital Health, however, retains the authority to skip any steps set forth below in order to accelerate the disciplinary process or to immediately discharge you without following any of the steps set forth below based on the severity of the offense. The establishment of the Progressive Disciplinary System in no way abrogates the at-will aspects of your employment."

Employers should note --whether it has an employee handbook or stand-alone employment policies -- the critical need for clear and prominent disclaimers negating any contractual liability and reaffirming the at-will employment relationship. Employers need to be particularly careful regarding employment termination/progressive disciplinary procedures, to ensure the language does not create reasonable expectations for employees that a particular pre-termination process will be followed.

In connection with employee handbooks, employers need to also familiarize themselves with the National Labor Relations Board's Memoranda and Advice regarding employee handbook policies that may run afoul of the National Labor Relations Act, as recently summarized in our March 2015 Alert.

For more information regarding this alert, please contact Ian W. Siminoff at 973.994.7507 or isiminoff@foxrothschild.com or any other member of the firm's Labor & Employment Department.