

Third Quarter, 1997

## **LABOR UPDATE**

### *Recent Developments in Labor and Employment Law*

#### **EMPLOYEE HANDBOOKS REVISITED**

A pair of Illinois court decisions has continued to shape the ever changing legal landscape of employee handbooks.

Four nurses of Holy Cross Hospital sued their former employer for breach of contract claiming that they were discharged in violation of 1971 and 1972 employee handbooks. These employee handbooks contained a promise that the hospital would follow specific procedures before terminating an employee. The hospital argued that it had amended these handbooks in 1983 so that employees were to be considered terminable at will.

While the hospital was successful with this argument at the trial court level, the appellate court reversed finding that the hospital could not unilaterally amend its handbook. The court held that the 1971 and 1972 employee handbooks constituted binding employment contracts. Thus, to add the "at-will" disclaimer language to the 1983 handbook was an attempt by the hospital to modify an existing contract. Following traditional contract law principles, the court held that the hospital must give additional consideration (e.g., money or added benefits) to employees to support the modification.

The court held that the mere fact that the nurses continued to work at the hospital after the modification went into effect does not constitute sufficient consideration to make the modified handbook binding. As the court noted, "There was no bargained-for exchange to support plaintiffs' purported relinquishment of the protections they were entitled to under the existing contract. The modification by Holy Cross was solely for the benefit of Holy Cross and is unenforceable as to plaintiffs." *Mary Doyle, et al. v. Holy Cross Hospital*, 1st Dist. March 26, 1997.

The second decision involves a poorly drafted employee handbook. Michelle Anne Wheeler filed a lawsuit against her former employer, The Phoenix Company of Chicago, on a breach of contract theory. Wheeler claimed that an employee handbook created a binding employment contract that contained only five specific offenses that warranted immediate discharge. Wheeler claimed that she was discharged for an offense that was not specifically listed in the employee handbook.

The company filed a motion to dismiss Wheeler's lawsuit claiming that its employee handbook did not create an employment contract. Specifically, the company pointed to two sections of the handbook and acknowledgement to bolster its claim. First, the company presented an acknowledgement page signed by Wheeler that stated, ". . .I agree to conform to the rules and regulations set forth in the handbook and understand that I can be discharged at any time, with or without notice for violation of any of the rules in the handbook." Second, the company pointed to page three of the handbook that read in relevant part, ". . . Completion of this [probationary] period does not guarantee continued employment for any specified period of time, nor does it require that an employee be discharged for 'cause.'"

The court found these disclaimers unpersuasive. The court noted that the employee handbook did not contain any language specifically asserting that the employee handbook was not a contract. Additionally, the mild disclaimers that did exist in the company's handbook were not conspicuously placed and highlighted. Rather, the disclaimers were buried within the text of the handbook and were not highlighted to set them off from the regular text.

Finding the handbook constituted an employment contract, the court took the next logical step in finding that the company did not follow the progressive discipline procedures set forth in the handbook when it discharged Wheeler. *Michelle Anne Wheeler v. The Phoenix Company of Chicago*, Second District, 1995.

These cases demonstrate the need for a well-drafted employee handbook. Also, any amended employee handbooks should be closely reviewed to assure that they supersede any prior handbook versions.

\* \* \* \* \*

## **LONG TERM EMPLOYMENT CONTRACTS MUST BE IN WRITING**

The Illinois Supreme Court recently held that a promise of lifetime employment is not enforceable unless the parties have reduced their agreement to writing. The ruling was based on an ancient English rule of law, adopted by Illinois, known as the Statute of Frauds. The Statute of Frauds prevents the enforcement of oral contracts if it will take more than one year to perform.

Plaintiff Dennis McInerney, a golf equipment salesman, was offered employment with a competitor. Charter Golf, his present employer, told McInerney that if he turned the offer down,

he would be given a raise, increased commissions, and employment "for the remainder of his life". McInerney decided to forego the new employment opportunity and stay with Charter Golf.

Only three years later, the relationship between McInerney and Charter Golf soured and he was terminated. McInerney filed suit alleging that Charter Golf had breached his lifetime employment contract. However, the Illinois Supreme Court disagreed and found that an oral lifetime employment contract cannot be performed within one year and, therefore, is void. Although the Court acknowledged that McInerney could have died one year after the contract was made, thereby completing the contract in less than one year, the Court concluded that such an event was not only unlikely, but contrary to the intentions of the parties. Because the agreement was not reduced to writing, however, it was not enforceable under the Statute of Frauds.

The employer in this case was lucky to narrowly escape liability. If an employer truly wants to offer an employee a contract, the terms of the agreement should be carefully drawn up by counsel. However, any offer of "lifetime" employment is simply asking for trouble. *McInerney v. Charter Golf, Inc.*, Ill. Sup. Ct., May 22, 1997

\* \* \* \* \*

## **SURVEILLANCE OF EMPLOYEES REQUIRES BARGAINING WITH UNIONS BEFORE IMPLEMENTATION**

In two decisions recently issued by the National Labor Relations Board ("NLRB"), companies were found to have violated the National Labor Relations Act by unilaterally implementing security measures without first bargaining with their respective unions.

The Colgate-Palmolive Co. installed hidden surveillance cameras in the work place, including restrooms and the plant's fitness center, in an attempt to deter crime. These security measures were implemented without first negotiating with the union. Similarly, the Edgar P. Benjamin Healthcare Center unilaterally implemented security rules that required, among other things, the inspection of all packages as employees leave the nursing home facility.

The NLRB held that such security measures constituted mandatory subjects of bargaining requiring each company to first bargain with a union before implementation. The NLRB recognized that employers have a strong interest in preventing employee theft or other misconduct. However, the NLRB stated that both surveillance cameras and package inspection rules raise privacy concerns which impinge on the employees' working conditions. Also, both security measures significantly altered existing methods used by the companies in the past to detect such theft and misconduct.

These decisions demonstrate that companies may wish to consult with counsel before implementing new security measures.

## BITS AND PIECES

A Gallup Poll of 813 adults nationwide asked which professions the respondents most admire. Leading the list, as they have for years, were Druggists and Pharmacists, followed by Clergy. College teachers edged out Doctors for third. The rest of the list, in order: Dentists, Policemen, Engineers, Funeral Directors, Bankers, Public Opinion Pollsters, TV Reporters/Commentators, Journalists, Building Contractors, Local Officeholders, Newspaper Reporters, **Lawyers**, Business Executives, **Labor Union Leaders**, Real Estate Agents, Senators, Stockbrokers, Congressmen, State Officeholders, Advertisers, Insurance Salesmen and Car Salesmen.

\* \* \* \* \*

The Equal Employment Opportunity Commission says it is being more aggressive in filing discrimination lawsuits against companies, an April 1, 1997 Wall Street Journal article reported. The EEOC has filed 50 more lawsuits than at this time last year. These lawsuits include such big companies as Home Depot Inc. and Mitsubishi Motor Manufacturing of America, Inc.

\* \* \* \* \*

A female supervisor's policy of giving each of her female employees a hug, a bag of chocolate hearts, and a note signed "Love, Steph" when they picked up their paychecks did not create a sexually hostile work environment according to a federal district court judge in New Hampshire. According to the judge, two uninvited hugs over a three week period were not severe or pervasive enough to create a hostile work environment. The company has, however, discontinued the policy. *Drew v. First Savings of New Hampshire* (D.NH, 1997)

## QUOTABLE

A lawyer's primer: If you don't have the law, argue the facts; if you don't have the facts, you argue the law; if you have neither the facts nor the law, then you argue the Constitution."

*Anonymous*

Among attorneys in Tennessee the saying is: When you have the facts on your side, argue the facts. When you have the law on your side, argue the law. When you have neither, holler.

*Vice President Al Gore*

---

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written entirely by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

---

The LABOR UPDATE may be quoted or reproduced if credit is given to the source.