USING NON-COMPETES IN EMPLOYEE HANDBOOKS

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Hodgson Russ Non-Compete, Non-Solicit & Trade Secrets Alert
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Employee handbooks are an effective, and often necessary, tool for employers to use when conveying information to employees concerning workplace policies and procedures. Given the willingness of New York courts to transform employee handbooks into binding contracts, it has become common practice for an employer to insert broad disclaimer language in its handbooks, making clear that it cannot be treated as an enforceable contract. Case law demonstrates the implications of using broad disclaimer language in this regard.

In *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 (1982), the New York Court of Appeals recognized that provisions within an employee handbook can give rise to claims of breach of contract. In that case, plaintiff alleged that he had been wrongfully terminated, in violation of McGraw-Hill's employee handbook, which declared McGraw-Hill's policy of only resorting to termination based upon "just and sufficient cause" (id, at 460). Although McGraw-Hill argued that plaintiff was an employee at will, and thus subject to termination without cause, the Court found that the plaintiff had a potentially viable cause of action for breach of contract.

In the wake of *Weiner* and its progeny, it has become common practice to include, within an employee handbook, broad disclaimer language, making it clear that the employee handbook should not be construed as a binding contract, and that the handbook is being provided for informational purposes only. Such disclaimer language has been deemed sufficient to defeat claims that an employer is liable for contract breach when its actions run contrary to its employee handbook (See, e.g., *Lobosco v. New York Tel. Co./NYNEX*, 96 NY2d 312 (2001); *Martin v. Southern Container Corp.*, 92 AD3d 647 (2d Dept. 2012). It should be kept in mind, however, that such disclaimer language can also benefit the employee, by defeating the employer's attempts to enforce certain provisions found within its own handbook.

Both employers and employees should be wary of the implications that accompany the all-too-common practice of inserting broad disclaimer language into employee handbooks. Strategies should be adopted to ensure that everyone's legitimate interests are protected. One approach would obviously be the use of narrower disclaimer language within the handbook itself.

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Another, and likely more effective, strategy would be to draft standalone agreements that address those obligations that the employer may wish to enforce (e.g. a separate non-compete covenant, or agreement to arbitrate). With the assistance of skilled counsel, these interests can be met through effective drafting of these materials. Similarly, litigation counsel should be prepared to assist clients when disputes arise concerning the implications presented by the interplay between employee handbooks and ancillary agreements.

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