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SOUTH CAROLINA EMPLOYMENT LAW UPDATE

On March 15, 2004, South Carolina Governor Mark Sanford signed a bill fundamentally altering current South Carolina law on employment at-will. The bill states that “a handbook, personnel manual, policy, procedure or other document issued by an employer shall not create an express or implied contract of employment” when the employer meets certain conditions. The law goes into effect on July 1, 2004 and will reverse the gradual erosion of the at-will doctrine by South Carolina courts.

Background

Although the employment at-will doctrine states that employers and employees can terminate the employment relationship for any reason not protected by law, South Carolina courts have chipped away at this doctrine over the last couple of decades. In 1987, for example, South Carolina courts found that documents created by an employer, and employee personnel manuals or handbooks, in particular, could be contracts of employment. Whether a particular document was or was not a contract was often a question for a jury, thus burdening employers not only with the costs of litigating a jury trial, but the added expense of providing any promised benefits outlined in the document.

Employers responded by including conspicuous disclaimers in their handbooks and other documents stating that the documents did not alter the at-will relationship. In 2002, however, the South Carolina Supreme Court ruled that “promissory” or “mandatory” language in a handbook containing a conspicuous disclaimer made the document inherently ambiguous, thus creating a jury question regarding whether the document was a contract of employment. A year later, the Supreme Court found that a jury should decide whether a handbook containing a disclaimer and an anti-discrimination policy, which by its nature must contain mandatory language, created an employment contract.

The Legislature Responds

Section 41-1-110 of the South Carolina Code states that:

It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

(§ 41-1-110). The new law will enable employers to again reduce the risk of their employment-related documents becoming the basis for a breach of contract claim. That said, however, the legislation does not identify adequate disclaimer language, nor does it address other modifications to the at-will doctrine, such as the public policy exception allowing claims of wrongful discharge or the oral exception to employment at-will. Employers will still need to be vigilant in preserving and protecting the at-will relationship.

Recommendations

Since § 41-1-110 does not go into effect until July 1, 2004, employers have time to evaluate their current employment policies, practices and procedures to determine whether and how to take advantage of this new law. Many employers, for example, have stopped issuing handbooks, or have limited their policies and procedures for fear of contract claims being filed against them. The new law provides a safe harbor from such claims, however, and may encourage employers to implement new or expanded policies and procedures. Employers should consider the following:

- § Whether and when to revise, reissue or replace handbooks and other documents, such as employment applications, offer letters, and benefits statements.

- § Language for the “new” disclaimer. At minimum, it should state that: (1) the handbook is not a contract of employment; (2) employment exists only on an at-will basis; (3) oral statements to the contrary do not alter the at-will relationship; (4) the new handbook or document supersedes any and all prior handbooks or documents addressing similar issues; and (5) that the employer reserves the right to modify policies outlined in the handbook.¹

¹ Under some circumstances, however, an employer may not want to reserve the right to modify certain policies, since reserving such a right may impact the enforceability of such policies. A court would likely find, for example, that an employer who reserved the right to modify a mandatory arbitration provision for the resolution of disputes, thus giving the employer the discretion to litigate or arbitrate, waived their right to insist upon arbitration.

§ How to comply with the conspicuousness requirements of the new statute:

§ The disclaimer must appear on the first page of the document in underlined, capital letters;

§ For handbooks or personnel manuals, the employee must sign the disclaimer;

§ The handbook or document should also contain a publication date, and the employee should be required to date their acknowledgment at the time of signing.

§ How to administratively handle the signature requirement and other recordkeeping requirements relating to the issuance of new documents (the employer should retain the original signed acknowledgment of handbooks and policy manuals).

In the course of reviewing handbooks and other employment related documents to ensure compliance with the new statute, employers should comprehensively review and update their policies and procedures to verify compliance with current law and to ensure that such policies and procedures are clear, unambiguous, and handled consistently.

Questions about this important new statute or employment issues generally should be addressed to the Hunter Maclean attorney with whom you normally work or to:

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