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KEY DRAFTING TIPS FOR MINIMIZING THE RISK OF LEGAL LIABILITY

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❑ Carefully Select Handbook And Policy Provisions.

Carefully select the provisions to be placed in the handbook and employment policies. You should be able to articulate a good reason for including every provision. If you cannot do so, then do not include it.

❑ Distinguish Information Appropriate For All Employees From That Appropriately Limited To Management.

Information that most employers desire to place in handbooks and written policies typically can be placed in two groups: (i) some information appropriate for dissemination to all employees, e.g., performance and conduct expectations and benefit information; and (ii) other information intended to guide supervisors and managers in handling personnel issues, e.g., documentation and discipline procedures for certain performance or conduct problems.

The North Carolina Supreme Court in **Harris v. Duke Power Co.**, 319 N.C. 627 (1987), expressly recognized that employers may minimize the risk of being contractually bound to follow handbook and policy provisions by excluding information on the handling of personnel issues (e.g., documentation and discipline procedures), from handbooks and policies distributed to all employees and, instead, including it in separate supervisor policy and procedure manuals not distributed to employees. The Court's express recognition of this means to minimize liability may render employers who nevertheless include such procedures in employee handbooks particularly susceptible to being held contractually bound to follow them.

❑ Include Only Policies And Provisions That Can Be Consistently Followed.

Handbook and policy provisions which are not uniformly and consistently followed undoubtedly will increase the risk of employee claims. To avoid inconsistent

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application of these provisions, employers should consider the following. First, state the policies correctly the first time. Amending policies will create confusion and morale problems. Second, state the policies in terms you are willing to follow. In particular, policies which are complex and time-consuming to implement probably will not be consistently followed. Third, take appropriate measures, such as training sessions, to ensure that the supervisors and managers who will implement the policies understand them and the need for consistently applying them. Supervisors who are unaware of employer's legal obligations, the legal consequences of their actions, or the content of handbook and policy provisions cannot be expected to implement the provisions in an effective risk protective manner.

❑ Do Not Rely On Form Handbook Provisions.

Form handbook and policy provisions typically are not drafted with either the law of the state in which they will be disseminated or the needs of the particular employer in mind. Consequently, use of such form provisions may increase the risk of legal liability. Nevertheless, they may be helpful in identifying possible topics for inclusion in handbooks and written policies and, therefore, may be used for this limited purpose. As explained above, however, no provision should be included in handbooks or written policies unless a good reason for doing so can be articulated. Moreover, once the topics are selected, the particular provisions addressing them should be drafted consistent with state law to minimize the risk of liability.

❑ Include A Legally Enforceable Disclaimer Provision.

To minimize the risk of legal liability from handbooks or other written policies, employers should include a legally enforceable disclaimer provision. Notwithstanding the desire to minimize the risk of legal liability arising from a handbook or other written policies, some employers decline to adopt explicit at-will disclaimers because they believe that such a disclaimer may impair their ability to recruit new employees or impair the existing workforce morale. In a few cases, an at-will disclaimer could increase the employees' perceived need for union representation. Employers may minimize these concerns, however, by carefully explaining the disclaimer's purpose to new and existing employees and its benefits to both the employee and employer.

Although the enforceability of a particular disclaimer will be assessed in accordance with a particular state's law in light of the circumstances in question, handbook disclaimers generally must be conspicuous, unambiguous, written in easily understood language and, in some states, effectively communicated to employees. The

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following is a checklist for satisfying these requirements based upon a non-exhaustive multistate review.

Disclaimer Checklist

Conspicuous

- Disclaimer should appear on first page, cover, introductory paragraph, or immediately above signature line on acknowledgment page.

Held insufficient: Disclaimer on second page, on sixth page, in "Welcome" section, on last page, "buried" in glossary or other section in which a general disclaimer would not likely appear.

- Disclaimer should be set out in distinguishing type (e.g., larger print, all caps, bold or contrasting type face, contrasting color, underscored, bordered, etc.)

Unambiguous

To be unambiguous, the disclaimer should expressly contain the following features:

- Employment Terminable At-Will.** The disclaimer should state that employment is strictly terminable at-will.
 - Terminable at-will should be defined as meaning that either the employer or employee may terminate the employment at any time with or without notice or intermediate measures for any reason or no reason at all.
 - The disclaimer should state that no provision in the handbook or any other personnel policy or procedure document shall be construed to the contrary.
 - The disclaimer should expressly state that no provision in the handbook or any other personnel policy or procedure document shall be construed to establish: (i) employment for a definite period of time; (ii) termination only for cause; or (iii) termination only after the occurrence of certain events.

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□ **Disavow Contract Obligations and Preserve Management Discretion.**

The disclaimer should state that no provision in the handbook or any other personnel policy or procedure document shall be construed to: (i) create an express or implied contract between the employer and employee; (ii) bestow upon the employee any contractual rights or contractually obligate the employer; or (iii) form an all-inclusive or inflexible set of rules.

The disclaimer also should state that, notwithstanding the provisions in the employee handbook or any other personnel policy or procedure document, management reserves the right to exercise its discretion in all employment decisions to deviate from such provisions and take any such action as it deems appropriate.

□ **Provided for General Information Purposes Only.** The disclaimer should state that the handbook provides general information only. It does not address every situation that will arise.

□ **Expressly Supersede All Previous Policies.** The disclaimer should state that the handbook supersedes all previously issued handbooks and other personnel policy or procedure documents and verbal representations concerning the matters addressed in it.

An exception to this statement should be included for employee benefit plan provisions. This exception should state that if an employee benefit plan provision conflicts with any provision contained in the handbook, the employee benefit plan provision will govern.

□ **Reserve The Right to Modify or Revoke the Provisions.** The disclaimer should preserve the employer's right to unilaterally change or revoke the provisions in the handbook or in any other personnel policy or procedure document at any time with or without notice.

□ **Disavow Any Purported Alteration of the Disclaimer.** The disclaimer should state that no manager, employee or other representative of the employer except an expressly designated individual (e.g., President) is authorized to alter the terminable at-will nature of employment or make any agreement contrary to the disclaimer.

The disclaimer also should state no such purported alteration or contrary agreement is authorized or binding unless it is set forth in a written employment agreement, expressly designated as such, signed by the designated individual and the employee.

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- **Language Outside the Disclaimer Must Be Consistent With Disclaimer.** Even the most well-drafted disclaimer may be held legally unenforceable unless the preservation of management discretion is reiterated throughout the handbook. Employees frequently argue successfully that it is fundamentally inconsistent and, hence, ambiguous to disclaim the intention to extend rights exceeding those afforded to at-will employees in one part of the handbook, while describing in detail progressive discipline and termination provisions in another part of the handbook. Accordingly, employers should expressly reiterate the preservation of management discretion in all provisions that discuss employee performance, conduct and other expectations and in all provisions that discuss discipline and termination.

- **Avoid Termination For Cause.** In particular, the handbook should not contain a provision that employees will be terminated only for "cause" or only in expressly enumerated circumstances (e.g., misconduct, reduction in force, etc.). Similarly, it should not contain a provision that termination will occur only after certain intermediate disciplinary measures are taken (e.g., warning, probation, suspension, etc.). In fact, words such as "cause", "just cause", "good cause" or "due process" should not appear in the handbook.

- **Avoid All-Inclusive Language.** Employers simply cannot foresee every possible circumstance in which they will desire to terminate or otherwise discipline an employee. Consequently, discipline and termination policies which attempt to anticipate every offense or circumstance are doomed to fail. Moreover, policies which may be construed as an all-inclusive list of offenses may be interpreted by the court as an intention for the unlisted conduct to be unsanctionable. Therefore, provisions that include a list of offenses or rules should expressly state that the list is not all-inclusive but rather is intended to serve as a list of examples. These provisions also should state that, in all cases, management expressly reserves the right to exercise its discretion in deviating from the provisions and in taking any action it deems appropriate, including termination.

- **Avoid Inflexible Language.** Discipline and termination policies also should be drafted in permissive, not inflexible or mandatory, language. For example, use "may" or "may in its discretion" instead of "shall", "will", or "should." Permissive language allows employers

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flexibility in administering policies without increasing the risk of being contractually bound to follow them.

Effectively Communicated

- **Avoid Incorporating Handbook or Other Policies as a Term of Employment.** To minimize the risk of being contractually bound to follow the handbook or other written policies, employers must not distribute them in a manner that purports to include them as terms and conditions of employment. To minimize the risk of being contractually bound to follow handbook and policy provisions, employers should:
 - avoid providing employees with handbooks until after they accept the offer and commence their duties (or at least, report to commence them);
 - avoid requiring employees to sign a statement acknowledging that they have received, read and understood the handbook and agree to abide by its terms;
 - require employees to acknowledge receipt of the handbook by having them sign a copy of the disclaimer which is attached as a tear-out page in the handbook; and
 - avoid referring to the handbook or any other policies in a written offer or confirmation of employment.
- Employees should sign acknowledgment of disclaimer.
- Employer should have well-documented system/method of distribution.
- Subsequently added or revised disclaimer must be communicated to employees and, in some states, if the employee had better than at-will terms, consideration must be given.
- **Avoid Disseminating Other Documents or Statements That May Render the Disclaimer Ambiguous.** Avoid statements or promulgation of other documents that are inconsistent with the disclaimer.

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- **The Disclaimer Should Be Drafted, Or At Least Reviewed, By Legal Counsel.** The disclaimer's purpose is to minimize the risk of legal liability. Consequently, it will effective only if it is drafted in accordance with the law by which it will be judged. Thus, it should be drafted by someone familiar with this law. Again, form disclaimers are only a starting point -- they typically are not drafted with the nuances of North Carolina's law in mind.

Periodically Review and Audit Handbooks and Policies

Changes in the law may affect the risk of legal liability arising from handbooks and other policies. Therefore, employers should periodically review and, if necessary, revise them accordingly. Most employers, however, delay assessing their risk of legal liability until a situation arises in which they do not want to follow the handbook or policy provisions. Often, these employers are faced with either foregoing the desired personnel action or exposing themselves to unnecessary legal liability simply because their handbook or policies were poorly drafted or not revised in accordance with changes in the law.

These periodic reviews also should confirm that existing policies are internally consistent -- internally inconsistent policies will be construed against the employer. And, they should confirm that all previously issued editions of revised policies were superseded or rescinded.

To facilitate handbook and policy revisions, these documents should be maintained in a loose leaf format so that the documents will not require reprinting each time a provision is revised.

Before Distributing A Handbook or Policy Remember That Someday You May Be Defending It Before A Jury