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Check Your Employment At-Will Disclaimers: New Jersey Appellate Court Scrutinizes Company's Code of Conduct

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A recent decision by the New Jersey Appellate Division is a glaring reminder for employers in New Jersey and elsewhere to review their employee handbooks, manuals and other codes of conduct periodically to ensure that their employment at-will disclaimer language is clear and prominent in compliance with the seminal decision on this issue, *Woolley v. Hoffmann-La Roche, Inc.* 99 N.J. 302, *modified*, 101 N.J. 10 (1985), and its progeny.

Avoiding a *Woolley* Claim

Most employers in New Jersey are familiar with the state Supreme Court's decision in *Woolley*, which held that a "Personnel Policy Manual" could contain an implied and enforceable promise that an employee could be fired only "for cause."

The Court in *Woolley* concluded that "when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of 'grudgingly' conceding the enforceability of those provisions, should construe them in accordance with the reasonable expectations of the employees." To avoid these types of employment contract claims, the Court in *Woolley* explained:

[I]f the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

After *Woolley*, the Supreme Court explained in *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401 (1994), that "prominence" means the text must be "set off in such a way as to bring the disclaimer to the attention of the reader," and that the requirement "can be met in many ways," with "no single distinctive feature is essential *per se* to make a disclaimer conspicuous" so long as it is likely to be noticed by an employee reviewing his/her rights under the handbook. Examples of

"prominence" include highlighting, underscoring, capitalizing, or text "presented in any other way to make it likely that it would come to the attention of an employee reviewing it."

NJ Courts Continue to Scrutinize Disclaimer Language

In the thirty-plus years since *Woolley* was decided, New Jersey courts continue to scrutinize disclaimer language in employee handbooks, manuals, and codes of conduct. Most recently, the Appellate Division, in a *per curium*, unpublished decision, reversed a trial court's dismissal of a breach of contract claim predicated on Valley National Bank's Code of Conduct and Ethics.

The plaintiff brought a claim for breach of contract, alleging that Valley Bank had failed to enforce its Code's anti-harassment provisions when her supervisor bullied and mistreated her. The Bank brought a motion to dismiss, relying on the follow language, which appeared in the first substantive page of an 18-page Code of Conduct pamphlet:

Employment is at Will:

Employees of Valley National Bank are generally employees-at-will. This means that both the employee and Valley have the unrestricted right to terminate the employment relationship, with or without cause, at any time. No employee or agent of Valley National Bank is authorized to make any oral or written representations altering at-will employment relationship unless made the subject of a specific written contract of employment. Such contract can only be authorized by the Chairman, President, and CEO.

It should be noted that nothing contained in this Valley Code of Conduct and Ethics or in any policy or work rule of Valley shall constitute a contract of employment or a contract or agreement for a definite or specified term of employment. (Emphasis added).

As to the "prominence" prong, the appeals court did not quarrel with the trial court's determination that the disclaimer was sufficiently prominent because the disclaimer appeared on the first substantive page of the Code, was set off in a separate paragraph, and introduced by a bolded title.

However, the court found the Code failed on the "clarity" prong, and concluded "the text of the disclaimer does not unambiguously disavow a binding contract to abide by the Code." The court scrutinized the last sentence's two phrases "contract of employment" and "contract or agreement for a definite or specified term of employment," and concluded that these terms could be read to relate only to "job security." The court explained the "disclaimer does not expressly and unqualifiedly disavow the creation of a contract, as *Woolley* suggested with the language, 'there is no promise of any kind by the employer contained in the manual; [and] that regardless of what the manual says or provides, the employer promises nothing . . . .'" The panel rejected the Bank's argument that the words "of employment" meant "related to your employment in any way." Instead, the court found that "[a]n equally plausible reading by a reasonable employee is that a 'contract of employment' means 'a contract to employ.'" Because the court held that the "content of the disclaimer is not clear," "the issue of its effectiveness" was remanded to the trial court and "reserved for a jury."

Takeaways

Employers should review their employee handbooks, manuals and codes of conduct periodically to ensure that the disclaimer language is clear and prominent in accordance with the guidance provided

by New Jersey courts, including *Woolley* and its progeny.

First, the disclaimer should be placed in a very prominent location (typically right after the cover page), set off in a separate page, and introduced by a bolded or highlighted title or all capital letters. You might also consider capitalizing the entire disclaimer to emphasize the message to employees.

Second, to avoid any claim that the Code constitutes a binding contract mandating employee behavior, employers should consider including the disclaimer language suggested by the court in *Woolley* in the Code or similar policy, specifically, *i.e.*, nothing in the Code of Conduct shall be interpreted to alter or modify your at-will employment status. The Code is not a contract. The Code does it contain any promises or guarantees of any kind with respect to any terms or conditions of employment.

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