

**Teacher's Manual**  
**Developing Professional Skills: Workplace Law**  
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**Chapter 2: Employee Handbooks**

**Problem:** Pharmaceutical company seeks review/revision of its personnel manual's policy on employee termination.

**Legal Rule(s):** The employee handbook (implied contract) exception to employment at will

**Skill(s):** Drafting

**Assignment:** Redraft the client's current policy to reduce the risk of contractual liability. Prepare to explain your revision to the client.

**Practice Norm(s):** Responding to adverse law; client management

**Professionalism Concept(s):** R. 1.2(a): Allocation of authority between client and lawyer; R. 2.1: Advisor

**Optional extension assignment:** Draft cover letter explaining revisions to the client.

**Legal Rules**

Contractual Nature of Personnel Manuals

It is well settled that promises contained in an employer's personnel manual may be contractually binding. Courts often couch their analysis of employee handbooks in terms of unilateral contract theory: the employer's manual constitutes an offer, which the employee accepts by beginning or continuing employment. But the key consideration appears to be the reasonable expectations of the employee. Courts have concluded that where the language of the manual is likely to lead employees to believe that the employer has promised some form of job protection, that promise will be treated as binding.

The termination policy in this exercise comes from *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257 (N.J. 1985), a primary case in many textbooks and one of the key state supreme court decisions on handbook enforceability. In holding in favor of the employee, the *Woolley* court noted that all of the categories of termination contained in the employer's policy were "for cause" terminations. There was nothing to indicate that termination might occur at will. In addition, the preamble stated that it was the company's "policy... to retain the services of all employees who perform their duties efficiently and effectively," essentially promising that the company would terminate only for just cause. Students should understand why the court construed this language as promissory. They will then need to alter it to make clear that, whatever the company's long-term retention goals, employment remains at will.

The other major change students must make to the policy is the addition of a disclaimer. *Woolley* and other courts have held that a disclaimer that clearly indicates that the employer does not intend to be contractually bound to the manual will defeat an employee's reasonable expectations of a binding commitment. An effective disclaimer usually also reaffirms employees' at will status and reserves management's right to alter the manual as needed. Many courts hold that the disclaimer must be clear and conspicuous, so students should take care to use simple, direct language that employees will easily understand and to place the disclaimer prominently in the manual (usually at the front and/or on a signed acknowledgement page).

An important subtlety is to appreciate how the handbook disclaimer will work in tandem with the affirmative language of the termination policy. Most courts are likely to award summary judgment to an employer where the manual includes a prominent and comprehensible disclaimer. A few, however, will scrutinize the disclaimer more carefully in the context of the manual as a whole. There is some case law concluding that strong promissory language in a personnel manual coupled with a weak or unclear disclaimer will create a jury question as to an employee's reasonable expectations.

### Employer Modification of Personnel Manuals

A related issue is the degree to which employers may modify a personnel manual that has contractual force. Jurisdictions have divided between those that permit unilateral employer modification at the employer's initiative and those that require the employer to secure their employees' explicit consent and provide new consideration in exchange for the revision. A slight majority of jurisdictions fall into the unilateral modification camp, but among these, many also require that the employer provide "reasonable notice" of the modification to the employees. The recent (and much criticized) Restatement of Employment Law has adopted the latter approach. See § 2.06.

There are at least two points to emphasize regarding modification. The first is simply that the task at hand implicates these rules. For many students this is not immediately obvious. The client asks the attorney to revise the manual; the client does not ask how to go about implementing it once it has been revised. Clients do not frame their needs around specific legal issues. Students should recognize from the litigation history recounted in the assignment instructions that the policy they are revising likely has contractual force and that any change therefore requires the client to comply with the applicable modification rule.

This raises a second issue: which of the two modification rules to apply. The exercise does not identify a particular jurisdiction, rather the client states that the company uses the manual at all of its locations across the country. This means that the client will likely have to satisfy the requirements of both rules. It is worthwhile to engage students on the question of how, practically speaking, this will be achieved. Students can brainstorm about different ways the company can provide consideration (an extra vacation day, a one-time bonus, etc.). Assent is generally achieved by asking the employee to sign an acknowledgement upon receipt of the new manual. One can ask whether this is sufficient, or whether the client should obtain more meaningful assent. An employee who simply signs a form is unlikely to appreciate its significance as an acceptance of changed terms. Finally, the students should consider whether and how much advance notice to provide before the revision goes into effect. While some courts appear to equate "reasonable notice" with actual notice (i.e., the employee was made aware of the revision), others appear to require advance notice (i.e., a non-negligible interval of time between distribution of the revision and its adoption).

## **Practice Norms**

### Responding to Adverse Law

Management-side practice frequently involves pro-active work, including auditing and revising personnel policies in light of developing law. The goal is to avoid not only liability, but also lawsuits and non-legal disputes. This practice context requires a different skill set than that associated with advocacy practice. Rather than argue how existing facts fit within the governing rules, the students are essentially

asked to create facts that comply with those rules, in this case the language of the client's handbook and the method of distribution.

As previously noted, this task includes identifying which rules to consider in situations where multiple possible rules can apply. Obviously a client with multiple locations, such as this one, must comply with the rules of all relevant jurisdictions. But an important practice norm in management-side work is the preference for over-compliance. Where the cost of complying with a more stringent rule is relatively low, best practices suggest that the lawyer structure the client's affairs within the bounds of its requirements regardless of jurisdiction. This insures against various possibilities: for instance, the client may expand into new jurisdictions where the more stringent rule applies, or the law in the client's jurisdiction may change. Such compliance efforts do not affect the client's legal strategy in the event of a future dispute. If an employee were to sue the company, challenging the legitimacy of the modification, the employer would certainly argue that the law allows it to revise its manual unilaterally. But the client is in a better position if it can argue in the alternative that it complied with any more stringent requirements.

### Managing Conflicting Client Goals

Another practice norm to emphasize is the need to balance a client's conflicting goals. The assignment tells the student that the client wishes to avoid future liability while maintaining the utility of the manual as a management tool. The former interest is based on law: the client wants the freedom to alter or deviate from its handbook without placing itself at risk of another breach of contract suit. The latter interest has nothing to do with the law and is actually at odds with the employer's desire to reduce legal risk. The company's termination policy helps create a positive work environment and ensures some amount of consistency in the administration of personnel matters. This means that the students cannot prepare a revision consisting entirely of boldface disclaimers that removes all semblance of any promise and satisfy the client's needs. If the client cannot retain the benefits it currently enjoys from the manual, it makes no sense to have one in light of the risk of contractual liability. Balancing that risk against the client's business goals is the challenge of the exercise.

## **Professional Ethics**

### Model Rule 1.2(a) – Client Decision-Making

Students are likely to have questions about the best possible approach to take in revising the manual given that no version will perfectly satisfy the client's competing goals. For instance, a light-handed revision of the termination language might simply replace the word "policy" with "goal" or "hope" so as to indicate that the company intends, but does not promise, to retain good employees. Another light edit is to indicate that the list of reasons for termination is not exclusive (adding language like "include but are not limited to"). Such revisions retain much of the company's original message, but only modestly reduce the risk of liability. A more aggressive revision might incorporate at-will language into the introductory text or the categories of termination, or even remove the categories of termination altogether. Such changes go much further in terms of reducing legal risk, but may result in a handbook that the company feels sends a negative message to workers or fails to ensure consistency in supervisory decision making.

This practical dilemma provides a useful context for exploring the idea that the lawyer is merely the enabler of the client's wishes rather than the actual decision maker. Rule 1.2(a) states that “[a] lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.” Students should understand that the ultimate determination about what language to use will be made by the client. The lawyer’s job is to advise the client as to the amount of legal risk posed by different versions of the manual. It is up to the client to assess its tolerance for risk relative to the strength of its other non-legal interests. If you choose to assign the optional cover letter, students can offer the client different options in their letter, explaining the pros and cons of each. Students should also understand the need to acknowledge the risks and limitations of whatever language they recommend. The lawyer cannot guarantee that his or her proposed revision, however carefully drafted, will eliminate all risk for the client.

#### Model Rule 2.1 – Moral and Ethical Considerations in Advising Client

A deeper ethical question presented by the exercise is whether effectuating the client's dual goals will result in a document that misleads workers. One might even ask whether that is the client's intent. If so, what is the lawyer’s ethical responsibility? A first cut at answering this question might emphasize the lawyer’s duty to the client. The lawyer owes no duty to the client's workforce, the handbook is not a court document, and there is no affirmative misrepresentation. That conclusion, however, does not address the degree to which students may find the endeavor unsettling, nor does it dictate that they go about their business disregarding the possible consequences of their work. Rule 2.1 provides that, in acting as an advisor, “[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.” In addition to asking how students feel personally about performing this task, one might ask whether a deceptively drafted policy actually serves the client’s best interests. One should remind students that the legal standard for determining an employer's contractual liability is the “reasonable expectations” of the employees. A document that truly misleads the worker will also fail the employer. In this context, personal ethics and client interests that appear to be in tension can to some extent be reconciled.

#### **Add-on Exercise**

After completing their revisions, students can prepare a cover letter to the client that enumerates and explains the proposed changes. Students should be encouraged to consider tone and audience: they are writing to a busy professional who is not attorney. They should therefore explain their changes clearly and concisely without unnecessary references to legal authority. Even so, they must project confidence and expertise. The client is asking for a legal opinion, and it is appropriate to explain why the proposed changes are legally required. The professor might take this opportunity to discuss formal advice letters. Several of the standard features of that format – such as a brief opening statement of the scope of the attorney’s review and a concluding paragraph noting the limitations of the advice supplied -- might appropriately be adapted to this assignment.