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Advocate's View

Restrictive covenants and employee manuals can make a bad combination

I have recently observed a trend in employment litigation: employers attempting to enforce covenants not to compete or solicit clients ("restrictive covenants") that are contained in employee manuals, as opposed to discrete contracts. Employers should reconsider this practice if they also want to disclaim that their employee manuals are not enforceable contracts.

Incorporating restrictive covenants into informal documents, such as manuals, likely stems from wanting to limit competition from terminated workers while maintaining an at-will employment relationship. New York is an at-will state where, in most cases, employers can fire workers and workers may quit their jobs "at any time for any reason or even for no reason." *Hall v. McDonald's Corp.*, 2018 N.Y. App. Div. LEXIS 1992, at *2 (4th Dept. Mar. 23, 2018). A fired at-will worker cannot sue an employer for "wrongful discharge," and "there is no exception for firings that violate public policy such as, for example, discharge for exposing an employer's illegal activities." *Lobosco v. N.Y. Tel. Co.*, 96 N.Y.2d 312, 316 (2001). If an employer does not violate a codified anti-discrimination, anti-retaliation, or whistleblower protection law, its right to fire its at-will workers is essentially unlimited.

The alternative to at-will employment is a contract setting a fixed term of employment. Such a contract limits the employer's right to fire a worker and the worker's right to quit for a period of time. A contract may forbid the employer from firing the worker unless the worker violates workplace policies (and is thus fired "for cause").

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Potentially separate from employment contracts are manuals that set out the employer's policies and practices. While employers may require workers to confirm they received a manual and agreed to its terms, manuals typically include disclaimers that they do not create legally binding obligations or constitute employment contracts, and that workers can still be terminated at will. When manuals contain such "conspicuous disclaiming language," courts reject terminated workers' arguments that the manuals' terms modified the at-will employment relationship and prohibited termination except "for cause." *Id.* at 317.

The last piece of the puzzle is the restrictive covenant. Because restrictive covenants are judicially disfavored and subject to close scrutiny for reasonableness, they can be difficult to enforce even when workers voluntarily agree to them. But when employers include restrictive covenants in their employee manuals, they run the risk that courts will view the covenants not as enforceable contracts, but as unenforceable policies. This is because courts should not allow employers to have it both ways: manuals are either binding contracts (which could support a promise of something other than at-will employment) or they are not. See *Am. Leisure Facilities Mgmt. Corp. v. Brutus*, 2014 N.Y. Misc. LEXIS 4298, at *17 (Sup. Ct. N.Y. County Sept. 30, 2014) (finding that an employer could not enforce a restrictive covenant in an employee handbook because the handbook stated it was "not a binding contract").

There is no "per se rule" against imposing restrictive covenants on at-will employees. *Brown & Brown, Inc. v. Johnson*, 115 A.D.3d 162, 170 (4th Dept. 2014). If employers want to avoid doubt that their restrictive covenants are actually contracts, they can publish their restrictive covenants and have their employees sign them separately from nonbinding employee manuals. An employer reluctant to do that should consider if it is prepared to enforce its restrictive covenant in court.

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