BURR FORMAN LLP

The state of at-will employment in South Carolina

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My articles usually analyze a particular case and the impact of the court's decision on the relationship between employers and employees. With the release of a number of decisions addressing employment at will earlier this year and some guidance issued by the National Labor Relations Board (NLRB), we thought a summary of the state of at-will employment in South Carolina would be timely. Read on to see what's occurring here in this area of the law.

General principles of at-will employment

Before 1985, absent a written employment contract, a union contract, or protections provided by a statute such as Title VII of the Civil Rights Act of 1964, employees in South Carolina were generally considered employees at will who could leave their employment or be terminated for any reason-good, bad, or even morally wrong. After a lot of litigation, state lawmakers passed the "handbook statute" in 2004, making it the public policy of South Carolina that a handbook would not be considered a contract if it contained a proper disclaimer. The statute provides:

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

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the document. Whether or not a disclaimer is conspicuous is a question of law.

However, courts have recently rejoined the fray, and the parameters of at-will employment have become less clear.

Developments employers should be aware of

To better explain the issue, we must start with the 1985 *Ludwig* decision, which generally stood for the proposition that a worker would be employed at will unless a public-policy consideration overrode the at-will relationship. Since 1985, the general argument was that the public-policy exception to at-will employment applied in two situations:

1. If an employer requires an employee to violate the law; or
2. If the reason for the employee's discharge is itself a violation of criminal law.

However, just his year, the South Carolina Supreme Court held in *Donevant v. Town of Surfside Beach* that in addition to the two *Ludwig* exceptions, an at-will employee will have a wrongful termination claim if she can establish that her termination was retaliatory in violation of a clear mandate of public policy. That means an employer must explore whether there is relevant case law, a statute, an ordinance, or a regulation stating something along the lines of "It is the policy of" or uses the words "It is the public policy" before terminating its at-will relationship with an employee.

Also this year, the South Carolina Court of Appeals addressed the long-standing oral exception to at-will employment in *Parker v. The National Honorary Beta Club*. In *Parker*, the employer's handbook met the 2004 statutory requirements, but a board member told the staff liaison to its internal affairs committee (IAC) that she couldn't be fired for answering questions from the IAC. The court held that the jury's verdict carried an implicit finding that the employer's promise to the employee that she couldn't be fired for answering the IAC's questions altered her at-will employment, creating a contract that was breached when the CEO fired her for that very reason. (For more on *Parker*, see "Not smart: Beta Club CEO opens mouth, creates liability" on pg. 1 of our June 2018 issue.)

NLRB issues guidance on work rules

After its December 2017 decision in *The Boeing Company*, the National Labor Relations Board (NLRB) issued some helpful guidance on how it will examine private-sector employers' work rules. The *Boeing* decision focused on the balance between a work rule's negative impact on employees' ability to exercise their rights under the National Labor Relations Act (NLRA) and the employer's right to maintain discipline and productivity in its workplace.

In Guidance Memorandum 18-04, the NLRB identified three categories of rules:

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1. Rules that are generally lawful;
2. Rules that warrant individualized scrutiny; and
3. Rules that are plainly unlawful.

Some examples of rules that would fall under Category 1 and generally be deemed lawful include:

- Civility rules (e.g., "Employees are prohibited from using disparaging or offensive language");
- No-photography and no-recording rules;
- Rules against insubordination, noncooperation, or on-the-job conduct that adversely affects operations;
- Rules addressing disruptive behavior (e.g., "Creating a disturbance on company premises or creating discord with clients or fellow employees is prohibited);
- Rules protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against improper use of employer logos or intellectual property;
- Rules requiring authorization before employees may speak for the company; and
- Rules banning disloyalty, nepotism, or self-enrichment.

Category 2 rules requiring individualized scrutiny would include:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing the sharing of "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information, or confidentiality rules more specifically directed at employees' wages, terms of employment, or working conditions);
- Rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of other employees);
- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo/trademark);
- Rules generally restricting employees' ability to speak to the media or third parties (as opposed to rules restricting them from speaking to the media on the employer's behalf);
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations); and
- Rules banning employees from making false or inaccurate statements (as opposed to rules against making defamatory statements).

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Category 3 rules, which are generally unlawful, would include:

- Confidentiality rules specifically prohibiting employees from discussing wages, benefits, and working conditions; and
- Rules against joining outside organizations or voting on matters concerning the employer.

Lessons for employers

At-will employment remains the preferred approach to the employment relationship in South Carolina. With that in mind, we encourage you to take a look at your current handbooks in light of the following questions:

- Have you preserved the at-will relationship in your written policy guidance by appropriately disclaiming that your documents are not contracts?
- Are your handbooks or other policy guidance written in discretionary, rather than mandatory, terms?
- Have you made certain that you have eliminated any ambiguities and the language in your written policies and guidance is consistent throughout your handbook?
- Have you trained your supervisory and management team members on what to say and not say? The oral exception to at-will employment clearly illustrates the adage that loose lips sink ships.

Finally, consult with your attorney when you decide to terminate an employee, and review your decision to be as certain as possible that the employee cannot cobble together a public-policy argument.

For more information on the BLR, click here. For more information on the South Carolina Employment Law Letter, click here.