

# Employment Law For The In-House Attorney (With Sample Clauses)

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When you know both the law and the business, you can really help your client to deal with its employment issues.

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**AFTER MORE THAN** 17 years as General Counsel for various companies in the staffing industry, trying to safely tread the minefield that is employment law—and finding ways out for clients who wandered into the same minefield without a map—I gained some insights about employment law compliance from an operational as well as legal perspective. One of the distinct advantages for in-house counsel is that you know the employer's employment practices in the context of its business. Armed with the knowledge of areas in which your company may be vulnerable and the practical steps you can implement, you'll be able to prevent expensive, time-consuming litigation. Your efforts in identifying areas of non-compliance and implementing strategies to prevent problems will pay significant dividends for the company.

**EMPLOYEE HANDBOOKS: PRESERVING EMPLOYMENT-AT-WILL** • You've told your HR department and operations managers what they must and can't put in an offer letter for an employee who will be hired on an at-will basis. You've created the ultimate employment agreement template. But, what about those lurking implied contract claims that arise out of poorly drafted employee handbooks?

As compliance with employee benefits policies becomes increasingly complicated and employment law claims and novel applications of the law are developed by increasingly sophisticated plaintiffs' attorneys, companies have responded by codifying their employment policies, both as a defensive approach to compliance, as well as a way to ensure that their application is consistent company-

wide. Careful drafting and disclaimer language contained in an employee handbook will help to ensure that they do not backfire against your company as the basis for an implied employment contract claim.

### **Implied Contract Theories**

In recent years, some states have modified the employment-at-will common law rule by recognizing exceptions based on an implied covenant of good faith and fair dealing as well as considerations of public policy. The good faith and fair dealing exception is in reality based on an implied promise, that as part of the employment relationship, the employee has the expectation that the employer would not terminate the relationship arbitrarily or without good reason. Public policy considerations usually focus on protecting employees after the exercise of a statutory right, refusal to violate the law, or some other basis that furthers the public interest along the lines of whistleblower statutes. When an employee can demonstrate that he or she relied on certain provisions contained in the manual at the time of hire, some courts have found employers to be bound contractually to an implied contract. Additionally, progressive discipline provisions contained in an employment manual (which I do *not* recommend) have been held to constitute limitations on the employer's right to terminate. If your company fails to follow its progressive discipline policies, it may have contractual liability if the employee refused another job opportunity or left another position. (An employer's failure to apply its own progressive discipline policy consistently can also give rise to claims for disparate treatment under discrimination statutes.)

Although there are significant benefits to maintaining a properly drafted manual, in my experience, with good disclaimer language, you can gain the benefits of legal compliance, clear explanation of employee benefits, and a positive employee relations tone. In addition, there are significant reasons relating to statutory compliance that an employer is far better off having the written policies in one cohesive document. Certain states require that the employer provide written information relating to hours worked, paid time off, and other local regulatory policies. Besides the mandatory legal postings that most employers accomplish by way of a consolidated poster, certain federal statutes require employers to have a written policy with respect to compliance with the law (one example would be the Family Medical Leave Act). Certain other protections such as use and reliance on anti-harassment and anti-discrimination policies—if stated and consistently enforced—can help employers defend themselves against legal claims for these kinds of issues.

The key points here are to ensure that no HR representative or manager makes inappropriate oral assurance at the time that an offer is extended, and that the employment manual itself contain sufficient disclaimers regarding continuation of employment, grounds for termination, and provisions for progressive discipline. Employers should make sure that the handbook, in addition to an acknowledgement of receipt, contains on the same signature page a clear employment-at-will disclaimer. The disciplinary provisions in the handbook should be prepared with a clear view toward not limiting the employer's right to terminate without good cause.

### **Sample Disclaimer Language**

Sample disclaimer language which should be printed in bold at the beginning of the handbook and again on the acknowledgement page could read as follows:

**THIS HANDBOOK IS NOT AN EMPLOYMENT AGREEMENT, EXPRESS OR IMPLIED. YOUR EMPLOYMENT IS NOT GUARANTEED FOR ANY PARTICULAR AMOUNT OF TIME AND AS**

**SUCH YOU ARE EMPLOYED “AT-WILL.” EMPLOYMENT-AT-WILL MEANS THAT EITHER YOU OR THE COMPANY MAY TERMINATE THE EMPLOYMENT RELATIONSHIP AT ANY TIME, WITHOUT PRIOR NOTICE SO LONG AS THERE IS NO VIOLATION OF APPLICABLE FEDERAL, STATE, OR LOCAL LAW. THE COMPANY MAY CHANGE YOUR CONDITIONS OF EMPLOYMENT, FOR ANY REASON, WITH OR WITHOUT CAUSE OR NOTICE.**

**EMPLOYMENT AGREEMENTS: EFFECTIVE USE OF RESTRICTIVE COVENANTS** • From the employee’s perspective, the most important aspect of the employment agreement negotiation is the compensation section, especially for executives or other highly paid employees whose bonus or incentive payment may be based on their or the company’s performance. As important as these issues are for management as well, the other set of provisions that can potentially affect the company on a broader basis are the restrictive covenants included in the contract.

The three primary types of restrictive covenants are the non-disclosure covenant or confidentiality provision, non-solicitation covenant (anti-raiding), and non-competition covenant. Although the law varies from state to state, generally, there are common law as well as statutory protections. This is one of the most significant areas in which in-house counsel is in a better position than outside counsel in determining what the needs of the employer actually are when negotiating the provisions. Outside counsel will likely know the most current state of the law in the jurisdiction and whatever recent trends have occurred; however, you are in the best position to tailor the provisions to serve best the Company’s needs.

### **Nondisclosure Covenant**

In preparing the confidentiality provisions, you should strive to protect only the types of information that are truly confidential to the business and are maintained in that manner, company-wide. This would include:

- Customer lists;
- Potential employee lists;
- Information contained in electronic databases;
- Any patents and processes that the company owns; and
- Other information that is not known to the outside world.

The key in enforcing these kinds of confidentiality provisions is for the company to avoid a level of over-inclusiveness that would invalidate them when it comes time for enforcement. There should be internal policies that mandate the maintenance of confidential information as such so that the company can demonstrate, if it needs to down the road, that the information was protected and genuinely not available to the outside world.

### **Sample Nondisclosure Language**

A sample nondisclosure clause could read as follows:

*During and after EMPLOYEE’s employment with the COMPANY, the EMPLOYEE agrees that EMPLOYEE will not use, disclose, copy or retain or remove from the COMPANY’s premises any confidential or proprietary information or trade secrets, including, but not limited to, lists and information pertaining to clients and client contacts, employees, and all other ideas, methods, procedures, techniques, written material, and other know-how, developed or used in connection with the COMPANY*

*or belonging to the COMPANY (collectively, "Confidential Information"), other than for use in connection with authorized work performed for the COMPANY. Confidential Information shall also include, but not be limited to, financial and other information of the COMPANY, not generally available to others. Confidential Information shall also include all information contained or stored in the confidential databases of the COMPANY containing Confidential Information or other information of the COMPANY.*

## **Non-Solicitation Covenants**

In some industries, the customer contacts maintained by the sales personnel may be the key source of revenue for the company. For these companies, strict but enforceable non-solicitation and non-competition provisions in employment agreements are essential. Even in the absence of an employment agreement, the company needs to protect its proprietary information, its employees, its customers and itself from unfair solicitation and competition. Accordingly, for companies whose business is sensitive to competition, all employees, at every level, should sign a confidentiality and (at a minimum), a non-solicitation agreement at the outset of employment, regardless of their position.

### **Sample Non-Solicitation Language**

A sample non-solicitation covenant could read as follows:

*Employee agrees that during the term of his employment with Company, and for a period of 12 months after the termination of Employee's employment with Company, regardless of the cause of such termination, he will not, directly or indirectly, either on Employee's behalf or on behalf of any other person directly or indirectly: (i) solicit, divert, employ, hire away, engage, license, lease or recruit, or attempt to solicit, divert, hire away, engage, employ, license, lease or recruit, any person who was employed by the Company at any time during the 12 months immediately preceding Employee's termination of employment; or (ii) contact, circularize or communicate with or solicit or participate in the solicitation of, in any manner, directly or indirectly, any person who at any time during the 12 months immediately preceding Employee's termination of employment with Company was or is, as the case may be, a client or customer of Company.*

## **Non-Competition Covenants**

Because non-competition provisions affect the departing employee's ability to earn a living, in most jurisdictions they are enforced reluctantly and subject to very narrow interpretation. A critical element of an enforceable covenant not to compete is that it be drafted to extend only to unfair competition—because a non-competition covenant that restricts any kind of competition with the former employer is not likely to be enforced. The test employed by courts in most jurisdictions is:

At the outset, that the breadth of the restraint not be greater than what is required for protection of a legitimate business interest of the former employer. In this context, employer interests such as theft of confidential information or trade secrets, unfair abuse of an employer's good will or its relationship with its customers, would all be considered legitimate business interests;

That the restriction not put an undue burden on the departing employee with respect to his or her on-going ability to earn a living. Therefore, there are generally restrictions regarding the length of time the employee can be restricted and the geographic scope of the restriction;

That the covenants may not be contrary to public policy.