

2017

Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again

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EMPLOYEE HANDBOOKS AND POLICY STATEMENTS:
FROM GRATUITIES TO CONTRACTS AND BACK AGAIN

BY
STEPHEN F. BEFORT*

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I. INTRODUCTION

Employers commonly set out workplace policies and guidelines in employee handbooks, personnel manuals, and other unilaterally-created policy statements. The primary function of these documents is to convey information concerning personnel policies such as expected employee behavior, information on pay and benefits, and disciplinary

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procedures.¹ Traditionally, these documents were considered unenforceable as gratuitous statements of policy.² Beginning in the 1980s, however, courts increasingly began to construe such statements as creating binding employer obligations in appropriate circumstances.³

Sections 2.05 and 2.06 of the recently adopted *Restatement of Employment Law* discuss when employer policy statements should be considered binding and when they may be modified or withdrawn.⁴ Section 2.05, for example, accurately describes the two competing legal theories that jurisdictions use to enforce employee handbooks. But, this tells only half of the employee handbook story. The *Restatement* fails to come to grips with the practical reality that American employers more recently have utilized disclaimers and handbook modifications in a manner that returns employee handbooks back into the realm of unenforceable policy statements. Unfortunately, the *Restatement* appears to endorse the legal principles that have made this second half of the story possible.

II. RESTATEMENT SECTION 2.05

A. Restatement Position and Comment

Restatement Section 2.05, Binding Employer Policy Statements, provides:

Policy statements by an employer in documents such as employee manuals, personnel handbooks, and employer policy directives that are provided or made accessible to employees, whether by physical or electronic means, and that, reasonably read in context, establish limits on the employer's power to terminate the employment relationship, are binding on the employer until modified or revoked (as provided in § 2.06).

1. See Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L. J. 326, 335 (1992).

2. See, e.g., *Johnson v. Nat'l Beef Packing Co.*, 551 P.2d 779, 782 (Kan. 1976) ("It [the employee handbook] was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy.").

3. See Befort, *supra* note 1, at 335.

4. RESTATEMENT OF EMP'T LAW §§ 2.05, 2.06 (AM. LAW INST. 2015).

Restatement section 2.05 adopts the position that policy statements made in such documents as employee manuals, personnel handbooks, and employment-policy directives that establish limits on the employer's power to terminate the employment relationship "are binding on the employer until modified or revoked."⁵

The reporters' notes explain that "[t]his Section adopts the position of the clear majority of U.S. jurisdictions . . . that unilateral employer statements can, in appropriate circumstances, establish binding employer obligations."⁶ The comment asserts that "some" courts reach this result by applying unilateral contract analysis.⁷ The comment criticizes this approach as "a conceptually awkward fit" in that employees rarely are aware of the content of these statements when they accept or continue employment.⁸ The comment goes on to state that "other courts, and this Restatement, rest the binding effect of unilateral employer statements on general estoppel principles."⁹ Making an analogy to "administrative agency estoppel," the comment contends that when an employer announces unilateral statements intending to govern personnel policy matters, those statements should be binding on the employer until properly modified or revoked.¹⁰

The comment states that unilateral employer statements should be "reasonably read in context" to determine whether they have a binding effect.¹¹ The comment references three factors that should be considered in this regard: the presence of a prominent disclaimer, the mode by which the employer disseminates the document, and whether the particular workplace culture relies on bilateral agreements."¹²

B. Critique

1. The Binding Nature of Employer Policy Statements

Although some jurisdictions, such as Georgia, Florida, and Missouri, continue to view handbook pronouncements as mere

5. *Id.* § 2.05.

6. *Id.* § 2.05 reporters' notes, cmt. a.

7. *See id.* § 2.05 cmt. b.

8. *Id.*

9. *Id.*

10. *See id.*

11. *Id.* § 2.05 cmt. c.

12. *Id.*

statements of policy without any enforceable effect,¹³ the comment is clearly correct in asserting that the vast majority of U.S. jurisdictions recognize that provisions in employee handbooks and similar documents can be binding on the employer even though promulgated unilaterally.¹⁴ A few jurisdictions have suggested that unilaterally promulgated policy statements may be enforceable in dicta but have not addressed the issue squarely.¹⁵ Finally, New Hampshire has only found handbook provisions to be binding when collateral employment benefits are promised; it is unclear if a promise of job security is enforceable on the same grounds.¹⁶

2. Rationale for Enforcement

Although the comment states that “some” courts employ unilateral contract principles in analyzing handbook statements,¹⁷ it is clear that the vast majority of courts that have recognized the enforceability of handbook provisions have done so on the basis of unilateral contract theory.¹⁸ In general, an implied-in-fact unilateral contract can be established if: “(1) [the] handbook is sufficiently definite in its terms to create an *offer*; (2) the handbook is communicated to and accepted by the employees so as to constitute *acceptance*; and (3) the employee provides *consideration*.”¹⁹ Most courts utilizing unilateral contract principles find that an employee’s continued work performance after receiving a handbook or similar policy statement provides both the requisite acceptance and

13. See *Quaker Oats Co. v. Jewell*, 818 So.2d 574, 580 (Fla. Dist. Ct. App. 2002); *Doss v. City of Savannah*, 660 S.E.2d 457, 667 (Ga. Ct. App. 2008); *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. 1988). In addition, Montana has created a claim for wrongful discharge by statute which expressly preempts any claim for discharge that may arise from “express or implied contract.” MONT. CODE ANN. § 39-2-913 (2015).

14. See Jason A. Walters, *The Brooklyn Bridge is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree’s Assent*, 32 CUMB. L. REV. 375, 379 (2002).

15. See, e.g., *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 891 (Ind. Ct. App. 2007) (declining to decide the issue whether handbook provisions can modify the at-will rule); *Neri v. Ross-Simons, Inc.*, 897 A.2d 42, 47-48 (R.I. 2006) (stating that even if it were to recognize the enforceability of handbook statements, the presence of a disclaimer foreclosed the possibility of such a claim’s success in that instance).

16. See *Butler v. Walker Power, Inc.*, 629 A.2d 91, 93 (N. H. 1993).

17. RESTATEMENT OF EMP’T LAW § 2.05 cmt. b.

18. See Bruce Yoder, *How Reasonable is “Reasonable”? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L. J. 1517, 1523 (2008); see, e.g., *Asmus v. Pac. Bell*, 999 P.2d 71 (Cal. 2000); *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89 (Conn. 1995); *Pine River State Bank v. Metille*, 333 N.W.2d 622 (Minn. 1983); *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1982).

19. *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 203 (Iowa 1997).

consideration to support a binding unilateral contract.²⁰

In contrast, only a handful of states rely on estoppel principles in determining the binding nature of employer policy statements.²¹ The Michigan Supreme Court has been the most influential proponent of this view with two landmark decisions: *Toussaint v. Blue Cross and Blue Shield of Michigan*,²² and *Bankey v. Storer Broadcasting Co.*²³ As the Michigan court summarized in *Bankey*, “written personnel policies are not enforceable because they have been ‘offered and accepted’ as a unilateral contract; rather, their enforceability arising from the benefit the employer derives by establishing such policies.”²⁴ Most states that use promissory estoppel analysis do so as a co-existing alternative to unilateral contract analysis, thus providing two possible justifications for enforcing unilateral policy statements.²⁵

The *Restatement’s* endorsement of the estoppel rationale comes with some obvious advantages and disadvantages. On the plus side, the estoppel approach arguably entails a more purposeful inquiry into the policy reasons underlying the enforcement of handbook statements. As I summarized in an earlier article:

The promissory estoppel analysis offers two advantages in the handbook arena. First, promissory estoppel appropriately focuses on the legitimacy of employee expectations rather than on the somewhat fictionalized search for the contract law technicalities of acceptance and consideration. Second, promissory estoppel theory goes beyond the promise principle to consider explicitly the underlying equities or “injustice” of enforcement or nonenforcement. While the equity factor may well drive many of the handbook cases under either theory, promissory estoppel analysis does so openly and directly instead of covertly through a manipulation of other factors.²⁶

The estoppel approach also recognizes that handbooks are not merely gratuitous statements, but that employers purposely disseminate such documents for the purpose of securing tangible

20. See, e.g., *Pine River State Bank*, 333 N.W.2d at 629.

21. See Befort, *supra* note 1, at 344.

22. 292 N.W.2d 880 (Mich. 1980).

23. 443 N.W.2d 112 (Mich. 1989).

24. *Id.* at 119-20.

25. See, e.g., *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Russell v. Bd. of Cty. Commr's*, 952 P.2d 492 (Okla. 1997); *Taylor v. Nat'l Life Ins. Co.*, 652 A.2d 466 (Vt. 1994); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984).

26. Befort, *supra* note 1, at 344 (citations omitted). In that article, I proposed that the enforceability of employee handbooks should be determined by a three-prong test: 1) does the handbook language contain a specific promise of job security or fair procedures, 2) that engenders reasonable employee expectations, and 3) serves to provide a substantial benefit to the employer? See *id.* at 374-75.

benefits. These benefits may include the following:

- 1) Promoting employee adherence to a desired code of workplace conduct;
- 2) Implementing a uniform personnel code which is easy to administer;
- 3) Avoiding unionization;
- 4) Boosting employee morale; and
- 5) Creating a favorable image in the community.²⁷

On the other hand, the *Restatement's* choice comes with three arguable disadvantages. First, the *Restatement's* adoption of the estoppel rationale does not simply restate or clarify the law; it instead seeks to alter existing law in most jurisdictions. Since the vast majority of U.S. jurisdictions currently utilize unilateral contract principles in evaluating the enforceability of employer policy statements, the *Restatement's* rejection of that theory represents a significant departure from the existing legal landscape. A second potential drawback is that traditional promissory estoppel theory requires a showing of individualized reliance, and some courts have refused to enforce handbook promises where the employee in question has failed to prove detrimental reliance on specific handbook terms.²⁸ This requirement imposes difficult proof problems and could result in inconsistent levels of job security among employees covered by the same policy language. This drawback could be minimized by adopting the approach of those courts that dispense with the requirement of individual reliance in favor of a rule requiring a showing only of objectively established group reliance.²⁹

The comment's approving reference to notions of "administrative agency estoppel" may be consistent with the latter approach,³⁰ but, as discussed below,³¹ this concept suffers from other

27. *Id.* at 337-38.

28. *See, e.g., Russell*, 952 P.2d at 503-04 (Okla. 1997) (finding a material fact dispute as to whether plaintiff established element of detrimental reliance on provision in personnel manual); *Stewart*, 762 P.2d at 1146 (Wash. 1988) (finding that plaintiff failed to submit proof of individual reliance on handbook layoff policies).

29. *See, e.g., Bankey v. Storer Broad. Co.*, 443 N.W. 2d 112, 119 (Mich. 1989) (stating that handbook promises should be enforced if they benefit an employer by encouraging employee expectations that lead to an "environment conducive to collective productivity").

30. RESTATEMENT OF EMP'T LAW § 2.05 cmt. b (AM. LAW. INST. 2015).

31. *See infra* notes 93-94 and accompanying text.

infirmities. Finally, promissory estoppel may provide a very limited remedy. Under traditional promissory estoppel analysis, a successful plaintiff is entitled only to recover damages incurred in past reliance as opposed to the anticipated value of future benefits.³²

3. Contextual Construction – The Particular Importance of Disclaimers

The comment to section 2.05 states that certain contextual factors may influence the enforceability of employer statements. As an example, the comment points out that the mode of an employer's dissemination of a policy statement may inform the enforceability determination.³³ As the reporters' notes indicate, "some courts deny [enforcement] to statements distributed only to supervisors."³⁴

In addition, courts generally will enforce only statements that are "definite in form" as opposed to mere "general statements of policy."³⁵ As the Illinois Supreme Court has stated, a handbook statement, in order to be deemed an offer for unilateral contract purposes, "must contain a promise clear enough that an employee would reasonably believe that an offer has been made."³⁶

The most important contextual consideration concerns the impact of disclaimers. Although they come in many different formats, the typical disclaimer is a provision within a policy document that states that nothing contained in the document should be construed as a contract and that the employment relationship may be terminated on an at-will basis.³⁷

A substantial majority of U.S. courts find that a clearly stated disclaimer will serve to bar the enforcement of employer policy statements.³⁸ This is particularly true in those jurisdictions employing unilateral contract analysis where a disclaimer generally is found to

32. See, e.g., *Grouse v. Grp. Health Med. Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); *Goff-Hamel v. Obstetricians & Gynecologists*, 588 N.W.2d 798 (Neb. 1999).

33. RESTATEMENT OF EMP'T LAW § 2.05 cmt. c.

34. *Id.* § 2.05 reporters' notes, cmt. a.

35. *Pine River State Bank v. Metille*, 333 N.W.2d 622, 626, 630 (Minn. 1983); see also *Aberle v. City of Aberdeen*, 718 N.W.2d 615, 621-22 (S.D. 2006) (ruling that a handbook can create an implied contract only if it embodies the clear intention of the employer to surrender its usual at-will prerogative).

36. *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987).

37. See Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 386 (1989).

38. See Yoder, *supra* note 18, at 1535; see, e.g., *Massey v. Krispy Kreme Doughnut Corp.*, 917 So. 2d 833, 841 (Ala. Civ. App. 2005); *Boulton v. Inst. of Int'l Educ.*, 808 A.2d 499, 505 (D.C. 2002); *Phipps v. IASD*, 558 N.W.2d 198, 204 (Iowa 1997).

preclude contract formation as a matter of law.³⁹ In these jurisdictions, the disclaimer effectively negates any notion that a policy statement constitutes an offer such that the court can dispose of the employee's claim without the need for jury deliberation.⁴⁰

There are, however, some exceptions to this general rule. First, courts generally will submit the issue of enforceability to a jury if the language of the disclaimer is ambiguous or if its placement is not conspicuous.⁴¹ Indeed, a few court decisions have gone so far as to find ambiguous disclaimers to be ineffective as a matter of law.⁴² Second, some courts find an inherent ambiguity in handbooks that contain both specific promises of job security and a disclaimer that attempts to negate the enforcement of such promises.⁴³ The outcome in these cases is for the ambiguity to be resolved by a jury rather than the court.⁴⁴

Those jurisdictions that utilize promissory estoppel principles apply a somewhat different analysis. In many instances, courts in these jurisdictions find as a matter of law that a clear and conspicuous disclaimer negates the existence of a promise on which employees reasonably may rely.⁴⁵ In other instances, however, courts applying estoppel theory find that a disclaimer does not automatically foreclose enforceability, but instead is just one piece of evidence for a jury to consider in determining whether a policy statement, taken as a whole, reasonably induced the work force to rely on its terms.⁴⁶ The Colorado Court of Appeals in *Cronk v. Intermountain Rural Electric*

39. See, e.g., *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 401-02 (Utah 1998); *Bouwens v. Centrilift*, 974 P.2d 941, 946-47 (Wyo. 1999).

40. See *Befort*, *supra* note 1, at 348-49; *Yoder*, *supra* note 18, at 1535.

41. See, e.g., *Ferguson v. Host Int'l, Inc.*, 757 N.E.2d 267, 271-72 (Mass. Ct. App. 2001); *Williams v. Precisions Coil, Inc.*, 459 S.E.2d 329, 341-42 (W.Va. 1995); *Clay v. Horton Mfg. Co. Inc.*, 493 N.W.2d 379, 382 (Wis. App. 1992).

42. See, e.g., *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989); *Hicks v. Methodist Med. Ctr.*, 593 N.E.2d 119, 121-22 (Ill. Ct. App. 1992); *Nicosia v. Wakefern Food Corp.*, 643A.2d 554, 561-62 (N.J. 1994).

43. See, e.g., *Guz v. Betchel Nat'l Inc.*, 8 P.3d 1089, 1103-04 (Cal. 2000) (finding a question of fact with respect to the effect of a disclaimer "where other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights"); *Fleming v. Borden, Inc.*, 450 S.E.2d 589, 598 (S.C. 1994) (ruling that a disclaimer is merely one factor in ascertaining whether handbook as a whole conveys enforceable promises); *Dillon v. Champion Jogbra, Inc.*, 819 A.2d 703, 707 (Vt. 2002) (finding ambiguity despite a disclaimer where language of the handbook and employer action indicated intent to create a contract).

44. *Guz*, 8 P.3d at 1103-04; *Fleming*, 450 S.E.2d at 598; *Dillon*, 819 A.2d at 707.

45. See, e.g., *Lytle v. Malady*, 579 N.W.2d 906, 911-12 (Mich. 1998).

46. See e.g., *Allabashi v. Lincoln Nat'l Sales Corp.*, 824 P.2d 1 (Colo. Ct. App. 1991); *Haselrig v. Pub. Storage Inc.*, 585 A.2d 294 (Md. Ct. App. 1991); *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866, 869-70 (Wyo. 1990).

Ass'n,⁴⁷ for example, ruled that an employee is entitled to enforce a handbook promise, notwithstanding the presence of a disclaimer, if it can be shown that:

[t]he employer should reasonably have expected the employee to consider the manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied upon the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures.⁴⁸

The task of the jury in these cases, accordingly, is not to resolve ambiguous policy language, but to determine the reasonable expectations that such language generates.⁴⁹

Section 2.05 does not specifically address how much weight courts should give to disclaimers. The comment states that the presence of a prominent disclaimer may indicate that a policy statement is only “hortatory” in nature, but that the broader context of the statement and other employer policies may indicate otherwise.⁵⁰ This sheds little light on such an important issue. Under prevailing handbook jurisprudence, the presence of a clear and conspicuous disclaimer will negate the enforcement of most employer policy statements.⁵¹ Not surprisingly, American employers almost universally insure that any employee handbook they issue is accompanied by a disclaimer. Given that reality, it is inadequate for section 2.05 to proclaim that employer policy statements generally are binding when, in fact, they are not.

Significantly, many commentators maintain that employment policy is ill-served by a legal rule that gives preclusive effect to boilerplate disclaimers without regard to the actual expectations created by employer policy statements.⁵² Having endorsed an estoppel approach to handbook enforcement, one might hope that section 2.05 similarly would support an estoppel approach to disclaimer analysis. If so, one would assume that the presence of a disclaimer would not

47. 765 P.2d 619 (Colo. App. 1988).

48. *Id.* at 624.

49. See Befort, *supra* note 1, at 366-67.

50. See RESTATEMENT OF EMP'T LAW § 2.05 cmt. b (AM. LAW INST. 2015).

51. See *supra* notes 37-43 and accompanying text.

52. See e.g., Befort, *supra* note 1, at 372-76; Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter*, 77 N.Y.U. L. REV. 6, 19-20 (2002); Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 751-52; Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1106-07 (1984); Yoder, *supra* note 18, at 1535-36.

automatically defeat handbook enforcement – the usual unilateral contract result – but instead would serve only as a factor in determining the appropriateness of collective reliance on handbook statements.⁵³ This, of course, would entail a more fact-intensive examination that in many instances would not be appropriate for resolution via summary judgment. It is likely, however, that section 2.05's preference for "administrative agency estoppel," as opposed to promissory estoppel, per se, does not contemplate such an approach.

III. RESTATEMENT SECTION 2.06

A. Restatement Position and Comment

Restatement section 2.06, Modification or Revocation of Binding Employer Policy Statements, provides:

(a) An employer may prospectively modify or revoke its binding policy statements if it provides reasonable advance notice of, or reasonably makes accessible, the modified statement or revocation to the affected employees.

(b) Modifications and revocations apply to all employees hired, and all employees who continue working, after the notice is given and the modification or revocation becomes effective.

(c) Modifications and revocations cannot adversely affect vested or accrued employee rights that may have been created by the statement, an agreement based on the statement (covered by § 2.03), or reasonable detrimental reliance on a promise in the statement (covered by § 2.02, Comment *c*).

Section 2.06 of the *Restatement* adopts the position that an employer may modify or revoke a previously issued and binding policy statement by providing reasonable notice of the change so long as such action does not adversely affect vested or accrued employee rights.⁵⁴

The comment to section 2.06 notes that the courts currently are split with respect to an employer's ability to modify existing policy statements. The comment states that

[a] substantial number of courts have held that an employee who continues to work for the employer after receiving proper notice of a modification or revocation of a unilateral employer statement that makes a personnel policy less advantageous to the employees than the original statement are deemed to have "accepted" the

53. See *supra* notes 45-48 and accompanying text.

54. Restatement of Emp't Law § 2.06.

change.⁵⁵

In contrast, the comment notes that “[a] smaller number of courts have held that a changed personnel policy covers only those incumbent employees who have expressly agreed to the change.”⁵⁶ The *Restatement* endorses the former view, asserting that an employer should be entitled to alter existing documents by providing the same or substantially equivalent notice as was provided when the prior documents were disseminated.⁵⁷ In terms of rationale, the comment states that “[i]t is not reasonable to assume that an employer intended permanently to circumscribe its operational policies through such non-bargained-for promulgations.”⁵⁸ In addition, the comment contends that permitting employers to alter policy statements only by means of a bilateral agreement is contrary to the equitable estoppel grounds that the *Restatement* recognizes as the basis for enforcing such statements.⁵⁹

B. Critique

1. Two Conflicting Views

a. Majority View

According to the scholarly commentary, a clear majority of states find that an employer may modify or revoke previously issued policy statements on a unilateral basis.⁶⁰ These jurisdictions take the position that an employee’s continued work performance after receiving notice of the change constitutes acceptance and consideration just as it did for the previously issued document.⁶¹ In essence, these courts adopt a “reverse” unilateral contract analysis, concluding that since the employer created the binding document unilaterally, it may also terminate or modify the resulting obligation in the same manner.⁶² As summarized by the Supreme Court of California, requiring actual

55. *Id.* § 2.06 cmt. e.

56. *Id.*

57. *See id.* § 2.06 cmt. d.

58. *Id.* § 2.06 cmt. a.

59. *See id.* § 2.06 cmt. e.

60. *See* Brian T. Kohn, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 819 (2003); Walters, *supra* note 14, at 387; Yoder, *supra* note 18, at 1527.

61. *See, e.g.,* Asmus v. Pac. Bell 999 P.2d 71, 78 (Cal. 2000); Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296, 298 (N.D. 1988); Fleming v. Borden, Inc., 450 S.E.2d 589, 595 (S.C. 1994); Ryan v. Dan’s Food Stores, Inc, 972 P.2d 395, 401 (Utah 1998).

62. *See* Befort, *supra* note 1, at 357-58; Kohn, *supra* note 60, at 819.

assent “would incorrectly impose a bilateral principle on the unilateral relationship, leaving the employer unable to manage its business, impairing essential managerial flexibility, and causing undue deterioration of traditional employment principles.”⁶³

Courts applying the majority rule generally place two limits on an employer’s ability to unilaterally withdraw or alter previously-issued policy statements. First, these courts require the employer to provide affected employees with reasonable notice of the alteration.⁶⁴ There is, however, no well-accepted understanding of what type of notice is “reasonable.” Some courts find that constructive notice is sufficient, such that the dissemination of a revised handbook itself constitutes reasonable notice.⁶⁵ Some other courts require more in the way of actual notice that specifically references the key alterations.⁶⁶ Meanwhile, a few courts, most notably the California Supreme Court in *Asmus v. Pacific Bell*, appear to require a period of advance notice before an announced alteration may take effect.⁶⁷

As a purported second limitation, these courts frequently state that an employer’s modification of a previously existing policy may not interfere with any rights that may have vested under the prior policy.⁶⁸ This rule occasionally has been invoked to bar an employer from refusing to provide a benefit, such as accrued vacation pay, that an employee has fully earned under a pre-existing policy.⁶⁹ But, this notion has no real meaning with respect to unilateral policy statements that provide for some limitation on the at-will dismissal presumption. Since the majority rule recognizes an employer’s right to rescind such policies on a unilateral basis, such employment security rights never truly vest.⁷⁰ In practical effect, accordingly, the majority view forecloses any possibility of a claim based on the

63. *Asmus*, 999 P.2d at 78 (citing *Demasse v. ITT Corp.*, 984 P.2d 1138, 1155 (Ariz. 1999) (J. Jones, dissenting)).

64. See *Walters*, *supra* note 14, at 387-88; *Yoder*, *supra* note 18, at 1533.

65. See, e.g., *Elliott v. Bd. of Trs. of Montgomery Cnty. Cmty. Coll.*, 655 A.2d 46, 51-52 (Md. Ct. Spec. App. 1995) (finding that employer’s dissemination of amended policies and procedures manual without explanation constituted sufficient notice).

66. See e.g., *Fleming v. Borden, Inc.*, 450 S.E.2d 589, 595-95 (S.C. 1994) (requiring that employer provide actual notice to employee of modification of previously binding handbook).

67. *Asmus* 999 P.2d at 80 (finding that employer that gave five months notice before revised policy took effect provided employees with “ample advance notice”).

68. See, e.g., *id.* at 76.

69. See e.g., *Amoco Fabrics & Fiber Co., Inc. v. Hilson*, 669 So. 2d 832, 835 (Ala. 1995) (vacation pay); *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 777 (Ohio Ct. App. 1984) (severance pay).

70. See *Asmus*, 999 P.2d at 79 (stating that “no court has treated an employment security policy as a vested interest for private sector employees”).

vesting of a promise of job security.

b. Minority View

The comment to section 2.06 is correct in stating that a smaller number of courts take a more restrictive view and find that an employer may modify the terms of a binding unilateral policy only upon obtaining the mutual assent of covered employees and/or by providing additional consideration.⁷¹ These courts reason that since the employee already possesses contractual rights flowing from the initial handbook, an employer's attempted modification that seeks to circumscribe those rights should be effective only if it satisfies the elements of a new bilateral contract.⁷² These courts contend that an employee's continuing to work is insufficient consideration in this context since the requisite consideration should benefit the employee who is relinquishing rights rather than the employer who is gaining rights.⁷³ They find that the majority rule, in contrast, places an employee in an impossible bind. As the Connecticut Supreme Court has stated: "[t]he employee's only choices [when presented with a modified document] would be to resign or to continue working, either of which would result in the loss of the very right at issue – that is, the loss of the right to retain employment until terminated for cause."⁷⁴

2. Scholarly Commentary

The scholarly commentary rather strongly disfavors the majority view. The range of opinion expressed by the academy on this issue falls along the following spectrum: 1) those that favor the minority view as best embodying pertinent contract law principles;⁷⁵ 2) those

71. See, e.g., *Demasse v. ITT Corp.*, 984 P.2d 1138, 1144 (Ariz. 1999) (requiring mutual assent and additional consideration); *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 99 (Conn. 1995) (requiring mutual assent); *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1144-45 (Ill. 1999) (requiring additional consideration); *Brodie v. Gen. Chem'l Corp.*, 934 P.2d 1263, 1268 (Wyo. 1997) (requiring mutual assent and additional consideration).

72. See *Thompson v. King's Entm't Co.*, 674 F. Supp. 1194, 1198 (E.D. Va. 1987); *Befort*, *supra* note 1, at 360.

73. See, e.g., *Doyle*, 708 N.E.2d at 1145 (stating "[b]ecause the defendant was seeking to reduce the rights enjoyed by the plaintiffs under the employee handbook, it was the defendant, and not the plaintiffs, who would properly be required to provide consideration for the modification").

74. *Torosyan*, 662 A.2d at 99.

75. See *Kohn*, *supra* note 60, at 804-05; Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197, 221 (1990); Stephen Carey Sullivan, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 261, 293 (1995).

that believe that modification attempts should be evaluated under the basic estoppel principle of whether the modified document nonetheless generates reasonable employee expectations;⁷⁶ and 3) those that believe that an employer should be able to modify or revoke policy statements with a reasonable period of advance notice ranging from a minimum of one week to a maximum of three months for those revisions that seek to extinguish a previously existing promise of job security.⁷⁷

3. *Restatement Rationale*

Section 2.06 adopts the prevailing majority view and recognizes an employer's authority to repudiate prior policy statement pronouncements on a unilateral basis.⁷⁸ The only limitation on this authority is that the employer must provide reasonable advance notice to effected employees in at least the same or substantially equivalent manner that gave rise to the earlier obligation.⁷⁹ Thus, an employer that distributed its initial policy manual without explanation would be free to do the same in revoking or modifying representations contained in the earlier document.

The comment to section 2.06 offers two justifications for the adoption of this position. First, the comment states that “[r]equiring employees expressly to agree to changes in employer statements would be unworkable for companies with large workforces.”⁸⁰ Two commentators have offered competing views on this issue. Bruce Yoder, in a 2008 article, provides general support for the justification offered by the comment in the following passage:

Perhaps the most persuasive argument against requiring additional consideration is that proscribing unilateral modification of handbooks would be an unwieldy and impractical policy for employers to implement. Such a rule would become a logistical nightmare, as a company manual “could never be changed short of successful renegotiation with each employee who worked while the policy was in effect.” Problems with holdouts, dates of hiring, and various manuals that had been previously issued would mean that employers could have drastically different obligations to many different employees.⁸¹

76. See Befort, *supra* note 1, at 377.

77. See Yoder, *supra* note 18, at 1540-42.

78. See RESTATEMENT OF EMP'T LAW § 2.06.

79. See *id.* § 2.06 cmt. d.

80. *Id.* § 2.06 cmt. e.

81. Yoder, *supra* note 18, at 1531 (quoting *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 120 (Mich. 1989)).

In contrast, Professor Matthew Finkin argues that the concern that an employer may end up with potentially different obligations owing to different employees is over-stated. He writes:

[E]mployers seem to have no difficulty today in freezing their guaranteed benefits pension plans vis-à-vis incumbent workers and hiring new workers under defined contribution plans (sometimes employer non-contributory) or affording them no pension benefits at all. Nor are employers apparently troubled by having the same work done in the same workplace by both regular and agency workers who work side-by-side under vastly different wage and benefits policies. Uniformity of treatment does not seem to be of much concern to employers in these cases. It is never explained [in the draft Restatement] why uniformity of treatment should drive in the opposite direction when it comes to job security.⁸²

The comment also contends that requiring employers to obtain a bilateral agreement to modify or revoke a unilateral policy statement is contrary to the equitable estoppel basis for enforcing such statements.⁸³ Some support for this view is provided by the analysis of the Michigan Supreme Court in *Bankey v. Storer Broadcasting Company*.⁸⁴ In that case, the court considered a certified question asking whether an employer could replace a discharge-for-cause policy statement with an at-will policy on a unilateral basis.⁸⁵ In addressing this issue, the court surveyed the various theoretical bases for enforcing policy statements and concluded that enforceability in Michigan “arises from the benefit the employer derives by establishing such policies,” namely by fostering employee expectations that “promote an environment conducive to collective productivity.”⁸⁶ The court, applying this estoppel-like standard, found that when an employer revokes an earlier policy by eliminating promissory language, “the employer’s benefit is correspondingly extinguished, as is the rationale for the court’s enforcement of the discharge-for-cause policy.”⁸⁷ Applying this logic, handbook modification should be permissible, even on a unilateral basis, if the employer also rescinds the source of its potential benefit.

The *Bankey* logic, however, does not necessarily extend to handbook modifications as opposed to handbook revocations. Take,

82. Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 11-12 (2006) (citations omitted).

83. See RESTATEMENT OF EMP’T LAW § 2.06 cmt. e.

84. 443 N.W.2d 112 (Mich. 1989).

85. *Id.* at 117.

86. *Id.* at 119.

87. *Id.*

for example, the case of an employer that seeks to modify a policy statement containing representations of job security through the addition of a disclaimer. If the new document contains both specific promises of job security as well as a disclaimer, the benefit to the employer is not necessarily extinguished. In this instance, the employees may conclude that the new handbook, read as a whole, continues to offer a credible promise of job security.⁸⁸ In this context, as discussed above, a number of courts applying estoppel principles would find a jury question as to the reasonable expectations generated by the document's overall tenor.⁸⁹

The likely retort from the drafters of section 2.06 to such criticism is that the *Bankey* rationale is not the type of "equitable estoppel" that they have in mind. As the comment notes, the equitable estoppel basis for policy statement enforcement differs from "contract principles of consideration, bargained-for exchange, or even promissory estoppel."⁹⁰ Instead, the equitable estoppel basis for enforcement likely refers to the "administrative agency estoppel" concept discussed in the comment to section 2.05.⁹¹ Under that theory, procedural rules promulgated by an administrative agency are binding on the agency while in effect, but the agency may modify or revoke those rules on a unilateral basis going forward subject only to the provision of reasonable notice.⁹²

The analogy to administrative agency estoppel may be subject to at least two criticisms in the context of employer policy statements. First, no jurisdiction has adopted administrative agency estoppel as the underlying rationale for enforcing employer policy statements. As such, the *Restatement* seeks to change rather than to restate or clarify existing law.

Second, it is not clear that the rules governing administrative agency procedure are comparable in nature to the rules governing the substance of the employment relationship. While a procedural rule in an agency context serves to provide guidance on the process of how an agency intends to determine substantive rights going into the future, a promissory statement made in the context of an ongoing employment relationship itself directly establishes the substantive

88. See Befort, *supra* note 1, at 377; Pratt, *supra* note 75, at 223.

89. See *supra*, notes 45-48 and accompanying text.

90. RESTATEMENT OF EMP'T LAW § 2.06 cmt. e (emphasis added).

91. See *id.* § 2.05 cmt. b.

92. See *id.*

rules governing that relationship. In some employment contexts, such as in the realm of procedural due process rights afforded by the Constitution to public employees, an employer's unilaterally promulgated rules and even practices have been found to be binding and not subject to unilateral alteration.⁹³ Further, promissory employer policy statements frequently foster expectations about future treatment. As Professor Finkin has stated in criticism of the *Restatement's* analogy to administrative agency estoppel:

This logic elides the fact that the loyalty the employer's policy sought to instill rested upon creating reasonable employee expectations about how they will be treated in the future. The labor of a human being is a non-durable good. The individual's dwindling supply is expended, other opportunities ignored or foregone, at least partly because of the expectation of fair treatment the employer has engendered. If expectation of deferred income could estop the employer from abrogating retroactively its commitment to severance pay, it would seem much the same should apply in the matter of job security; or, less strongly, that the [Restatement] rather badly needs to explain why it would not, by reason other than that abrogability better serves an employer's interest.⁹⁴

IV. CONCLUSION

Restatement section 2.05 accurately chronicles the transformation of employee handbooks and other policy statements during the 1980s and 1990s from unenforceable gratuities to binding contracts in appropriate circumstances. But that tells only half of the employee handbook story. Since that time, employers have used disclaimers and handbook modifications to transform these statements back into the realm of the unenforceable. Unfortunately, the *Restatement* endorses the legal principles that have made this second-act transformation possible.

Section 2.05 appropriately urges that the binding nature of employee handbooks should be a function of promises and benefits rather than a fictionalized search for invisible handshakes. But the *Restatement* fails to extend this more purposeful inquiry when the focus turns to disclaimers and handbook modifications. The *Restatement* instead gives determinative weight to the insertion of

93. See *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).

94. Finkin, *supra* note 82, at 12.

boilerplate disclaimers in new and revised handbooks without regard to the overall promissory tenor of those documents or the reasonable expectations they might create. Courts should not follow this misguided advice.