

**SJOBBERG**  **TEBELIUS**

ATTORNEYS & COUNSELORS  
AT LAW

**EMPLOYEE HANDBOOKS**

**And Non-Competes**

# EMPLOYEE HANDBOOKS

## Advantages to Adopting an Employee Handbook

Awareness

Communication

Good Faith

Consistency

Road Map



## **Risks**

**Employers may inadvertently create a contract with the employees;**

**More formal, structured environment; loss of management flexibility;**

**Not complying with specific state laws.**

# Balancing Act

SPECIFIC PROVISIONS TO GUIDE  
EMPLOYEES AND EMPLOYERS

VS.

GENERAL PROVISIONS TO PREVENT THE  
FORMATION OF A CONTRACT AND EMPLOYER  
FLEXIBILITY

# **FAILURE TO CUSTOMIZE**

# EXAMPLE

Vet Clinic has 2 vets, 5 techs, an office manager, and a receptionist. Clinic purchases an on-line computer program to create its Employee Handbook.

What was the result?

# RESULT

## Employee Handbook

- TOO BROAD because it includes FMLA leave
- NOT STATE SPECIFIC
- IMPLEMENTED A PROGRESSIVE DISCIPLINE POLICY

# Too Broad

**ADA only applies to employers with 15 or more employees**

**COBRA - 20 or more employees**

**FMLA only applies to employers with 50 or more employees**



# Must be State Specific

Protected Classes

Women's Economic Security Act (2014)



# Progressive Discipline

If employee violates company policy, the following procedure will apply:

1. STEP ONE
2. STEP TWO
3. STEP THREE



# Why is this a Problem?

Inflexible

“for cause” vs. “at-will”

Litigation

# Dealing with Discipline

Leave yourself with options;

Performance Improvement Plans;

Avoid probationary periods

Theft, misrepresenting your time card, and sexual harassment are grounds for termination.

The following are examples of grounds for immediate termination: theft, misrepresenting your time card, and sexual harassment; however, employees may be terminated immediately for any legal reason, at the discretion of the employer.

Employees will be terminated according to the following progressive discipline process:

- First Incident: Verbal Warning
- Second Incident: Written Warning
- Third Incident: Performance Improvement Plan
- Fourth Incident: Termination

Employees may be subject to the following four step progressive discipline process:

- First Incident: Verbal Warning;
- Second Incident: Written Warning;
- Third Incident: Performance Improvement Plan;
- Fourth Incident: Termination,

but Employer reserves the right to skip any or all of these steps, depending on circumstances.

# CONSISTENCY



# Ideal Discipline Policy

Explanation of “At-Will” Employment;

“Employee may be subject to disciplinary action, up to and including, termination for any violations of the policies set forth in this Employee Handbook;”

May give additional examples of discipline;

Does not obligate Employer to a set course of action;

Allows for termination, if consistent violations of different policies



# **ALTERING AT-WILL EMPLOYMENT**

# “At-Will Employment”

At-will employment means an employer may discharge an employee at any time for any legal reason, with or without notice, and an employee may resign at any time for any reason with or without notice, absent a bargaining agreement or different employment contract

# At-Will Employment

Include a statement that the employee understands the employment relationship is “At-Will”

Include the definition of “At-Will”

Recommended: Include this language within the first few paragraphs of the Employee Handbook as well as the Acknowledgement of Receipt of Handbook

# Misstating At-Will

Employment with the Company is at-will, which means the employment relationship may be terminated with or without cause and with or without notice at any time by you or the Company. **Only the Company President is authorized to modify the Company's at-will employment policy.**

Employment with the Company is at-will, which means the employment relationship may be terminated with or without cause and with or without notice at any time by you or the Company. **Employee acknowledges that the at-will employment relationship cannot be amended, modified or altered in any way.**

Employment with the Company is at-will, which means the employment relationship may be terminated with or without cause and with or without notice at any time by you or the Company. **No representative of the Company has authority to enter into any agreement to the contrary. Nothing in this handbook creates an express or implied contract of employment.**

# **NON-COMPETE AGREEMENTS**

What's Wrong With a Little Healthy  
Competition?

# TWO PREMISES

Employees owe their Employers a common-law duty of loyalty during the employment.

Employers want to continue that duty of loyalty, even after the employment has ended.

# Getting on the Same Page

Non-Compete: Agreement not to engage in direct or indirect activities that harm employer's legitimate business interests for a certain time and in a certain place.

Non-Solicitation: agreement not to solicit employer's current clients or employees.

Non-Disclosure: agreement not to disclose employer's confidential information or trade secrets.

Non-Disparagement: agreement not to bad mouth employer.

# Non-Competes

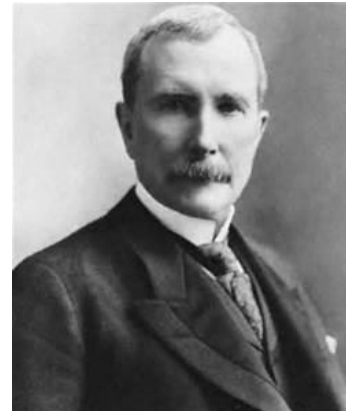


**“Competition . . . . is the incentive to progress.”**

**~ President Herbert Hoover**

**“Competition is a sin.”**

**~ John D. Rockefeller**





Therefore, in consideration of the compensation and benefits to be paid to Employee, Employee covenants and agrees that during the term of employment, and for a period of **twenty-four (24) months** following the termination of the employment for any reason, Employee will not, directly or indirectly, alone or with others, participate in any business or profession which competes with the Employer.

This Covenant Not to Compete shall be effective within a **fifteen (15) mile radius** from the location of the **Veterinary Clinic, located at**\_\_.

Notwithstanding any other provisions of this Agreement, it is understood and agreed between the parties that this Covenant Not to Compete shall **survive the expiration** or termination of this Agreement.

**Courts Disfavor Non-Competes  
because they are a  
“restraint on trade”**

# To be Upheld:

Reasonable

Supported by Adequate Consideration

# What is “Reasonable?”



Must Protect a Legitimate Business Interest;

Temporal Limitation;

Geographic Limitation





# What is Adequate Consideration?

Something given in exchange;

Separate/ Independent;

Value.

# What is not viewed as adequate consideration?

Continued Employment

**Be Firm in Your Requirement that  
they be signed Prior to Commencing  
Employment.**

# Other things that are not Adequate Consideration

Something the Worker is already entitled to;

Something other Workers who  
did NOT sign the non-compete, got as well



# Resolving Disputes

Negotiation/ Mediation

Injunctions

Damages

Blue Pencil

# Beating the Non-Compete

Employer has materially breached the Employment Agreement

Employer directed Employee to engage in illegal conduct (“Unclean Hands Doctrine”)

Short Employment

# What to Do When Your New Hire Comes With Baggage

**HAVE AN EXIT STRATEGY:**



# In Summary

1. Have an Employee Handbook
2. Retain an Attorney to Draft it
3. Narrowly Tailor your Non-Competes
4. Present Non-Competes to Employees before they start working
5. Think about the restriction – Can you live with it?

# Future Seminars

**NOVEMBER 10, 2015**

## **ESTATE PLANNING**

In this seminar, attorney Sam Stalsberg (Sjoberg & Tebelius, P.A.) will provide an overview of the estate planning process. Specific topics to be covered include the importance of planning for incapacity, how probate works and how to avoid it, changes to and planning for the Minnesota estate tax, and planning your legacy through charitable giving.

# SJOBBERG TEBELIUS

ATTORNEYS & COUNSELORS  
AT LAW

## Thank You

Anne Greenwood Brown  
2145 Woodlane Drive, Suite 101  
Woodbury, Minnesota 55125  
(651) 738 – 3433  
[anne@stlawfirm.com](mailto:anne@stlawfirm.com)