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Labor & Employment Bulletin

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Illinois Supreme Court Limits Employer's Right to Change Employment Handbooks and Policies

In its decision in *Doyle v. Holy Cross Hospital* (February 19, 1999), the Illinois Supreme Court laid down new rules which limit an employer's ability to change its employee handbooks and personnel policies and call into question the enforceability of every policy revision an employer has made and may make in the future. The *Doyle* decision requires all employers to reevaluate their existing handbooks and written policies and to consider the impact of long-superseded or rescinded handbooks and policies.

Since the Illinois Supreme Court's 1987 decision in *Duldulao v. St. Mary of Nazareth Hospital,* Illinois law has recognized that employee handbooks and personnel policies may give rise to contractual obligations on the part of the employer under certain circumstances. Those circumstances are that the language of the handbook or policy statement is clear enough that the employee would believe an offer has been made, the handbook or statement is communicated to the employee, and the employee accepts the offer by commencing or continuing to work after learning of it. By working after learning of the policy being "offered," the Court reasoned that the employee knowingly has provided something of value to the employer in return for the offer – what the law calls "consideration" – and a binding contract is thus created.

Prior to *Duldulao,* the rule in Illinois had been that employee handbooks and personnel policies were not contractual undertakings, and employees could not sue to enforce compliance with handbook policy provisions.

Duldulao meant that employees could now bring such suits. For example, the employer's handbook involved in *Duldulao* promised that employees would be discharged only after certain progressive disciplinary steps had been taken and for just cause. The plaintiff in that case was allowed to sue her employer, alleging that she was discharged without the benefit of progressive discipline and without just cause.

Duldulao reflected an emerging trend, and many employers anticipated it or responded to it by revising and reissuing their handbooks and policies to eliminate language which could be construed as a promise and by inserting disclaimers of contractual intent. The rationale was that if the policy said it was not a contract, no employee could reasonably believe it to be one. Illinois courts agreed, holding that these revised policies prevented contract formation even when the new language arguably eliminated employee rights created by prior handbooks or policies.

Doyle changes all of that. Under *Doyle*, absent special circumstances, an employee may bring a breach of contract lawsuit to enforce rights created under a previously issued handbook or policy, despite the issuance of a superseding handbook or policy revising the prior policy or containing a contract disclaimer.

The four plaintiffs in *Doyle* were nurses hired in 1972 or earlier. In 1971, Holy Cross Hospital issued a handbook to current employees and new hires, which contained a termination policy dealing with workforce reductions. The policy emphasized the Hospital's commitment to job security and set forth criteria that would be followed in the event work force reductions had to be made due to economic conditions. Perhaps anticipating the holding in *Duldulao*, the Hospital in 1983 added a contract disclaimer to its handbook, stating the Hospital's position that, as employees at will, all employees could be terminated any time for any reason. When the Hospital terminated the four plaintiffs in 1991, they sued, alleging they had been fired in violation of rights created under the 1971 handbook.

By a five-to-one vote, the Supreme Court held that, notwithstanding the 1983 policy revisions, the plaintiffs' case could proceed. In only its third decision dealing with employee handbooks, the Court ruled that because the

1971 handbook had not reserved to the Hospital the right to make unilateral changes, the Hospital could not revise the 1971 handbook to the plaintiffs' disadvantage without providing them with some new consideration – and thus the disclaimer added in 1983 was ineffective.

Relying on *Duldulao*, the Hospital argued that plaintiffs had accepted the 1983 disclaimer by continuing to work after it was issued. The Supreme Court disagreed, stating that the Hospital could not *reduce* rights (as the disclaimer purported to do) without giving something to the employees in consideration for taking something away. The Supreme Court reasoned that the employees' continued employment was not something the Hospital gave the employees.

The Supreme Court rejected the Hospital's argument that if the employees' continuation of employment was sufficient under *Duldulao* to accept policy changes which benefited them, it should be sufficient to accept handbook or policy changes that were detrimental to them. The Court also rejected the policy argument that its decision would mean that employers would be bound to handbooks and policies issued long ago (in *Doyle*, two decades earlier) and that different employees would be subject to different policies, depending on when they were hired. According to the Court, employers should be prepared to comply with their own policies even if, as in *Doyle*, those policies were issued long before *Duldulao* held that employee handbooks created legally enforceable obligations.

Doyle has critical significance to every employer in Illinois.

The decision is most relevant for an employer that, at one time may have had, as in the *Duldulao* case, employment policies or procedures which imposed limitations on its right to terminate at any time for any reason. Employers that had such policies, and then attempted to revise them through new policy provisions and/or contract disclaimers, may find that their revisions are of no effect and that employees can seek compliance with the more restrictive policies long thought superseded. The number of employees who may take advantage of such dated policies may not be very large, since those employees hired after the policy revisions will be bound by the new policies. Nevertheless, employers are now faced with the factually difficult chore of considering what policies were in effect

when an employee was hired and at various points in the employee's career.

Doyle also adversely affects those employers that now want to make policy changes that arguably are disadvantageous to employees. Whether the policy reduces a sick pay benefit, eliminates a grievance process, or introduces a less restrictive termination procedure, employees adversely affected by such a policy change may assert that the former policy still controls unless they receive some consideration or benefit to support the policy change.

Employers should consider several actions in response to *Doyle.*

First, employers will want to ensure that existing handbooks and policies contain contract disclaimers and provisions allowing unilateral employer revisions so that new employees are bound by those policies.

Second, employers should consider taking steps to eliminate obligations that may have arisen under prior handbooks or policies. Any such action must be carefully considered, but possible approaches include obtaining the employee's waiver of rights under old policies and acceptance of current policies in return for a specific pay or benefit enhancement.

Third, newly issued policies that are arguably less generous or favorable to employees must be supported by some sort of consideration. A possible approach is accompanying a reduction in one form of benefit with an enhancement of another, or providing a one-time across-the-board pay or benefit increase as consideration to support the introduction of a new set of policies.

Finally, there may be arguments available to an employer to support its contention that prior policies have in fact been superseded by later disclaimers or policy revisions. It may be that those subsequent revisions introduced policies both more and less generous to employees. Additionally, claims now sought to be asserted under *Doyle* may be untimely if the adverse action being contested occurred many years ago.

Doyle creates tremendous uncertainty for employers that, for years, have reasonably assumed that their efforts to

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disclaim contractual status of their employment policies have been effective. It creates further uncertainty for any employer who simply wants to revise an employee handbook, policy or procedure. Thanks to our Supreme Court, employees may just say no to policies they do not like, unless they contemporaneously receive something they do like.

For further information about the *Doyle* decision and its impact on your business, please call Bruce Alper (312/609-7890), Michael Cleveland (312/609-7860), or any other Vedder Price attorney with whom you have worked.

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