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The informational legal blog for employers and business owners who want to stay in compliance and out of court.

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Employment Contracts: Laying the Foundation

Welcome to The Emplawyerologist, a new weekly legal blog for employers! My name is Janette Levey Frisch. (You can read more about me [here](#).) Since I am still learning [WordPress](#), please bear with me if there are glitches with the first several posts! This blog is not legal advice and does not create an attorney-client relationship. Always consult with an attorney in your state on any subject discussed here. Let's start with an overview of employment contracts, one of the main building blocks in employment law. (Click [here](#) to listen to my podcast, *The Ins and Outs of [Employment Contracts](#)*.)

Using a written [employment contract](#) may be one of your most pivotal decisions as an employer. What if you have never written such a contract never signed one and never asked your employee(s) to sign one? Guess what? *You have nonetheless probably had employment contracts all along and not realized it.* How can that be? Let's answer that and other related questions, using a Q&A format:

What is an employment contract? Simply put, it is an agreement between the employer and employees(s) that defines the rights and obligations of each. Take note: *the agreement need not be in writing.* That is known as an [implied contract](#). Statements by you, your course of dealing with your employee(s) (i.e., regular consistent behavior) and sometimes, provisions in an employee handbook may also be part of your implied contract. Hiring an employee in a particular position for a particular salary can create an implied employment contract.

If just hiring an employee creates an employment contract, why bother with a written contract? It is almost always a good idea to have a well-written employment contract, drafted by competent local counsel, tailored to your needs, and that clearly states the essentials of the employment relationship. Would finding a replacement be time-consuming and costly? Your contract can require the employee to provide a minimum amount of notice before resigning. Will your employee have access to confidential and/or sensitive information? Include confidentiality provisions in your contract. Are you in a dispute with your employee about terms of employment? Without a written contract, you could end up in court arguing about that very issue, spending a lot of time and money doing so, only for a judge or jury to decide or find implied contractual terms that you never wanted or intended. Generally, I have only found a written employment contract counterproductive when it is poorly written, such that it is not understandable, vague and overbroad or even overly specific. Using the same contract for every single employee in every single situation can also cause significant problems.

What is the difference between an offer letter, an employee handbook and an employment contract? An offer letter offers an employee a specific job at a specific salary, and maybe for a specific duration. The letter may include a summary of paid time off and benefits.

The employment contract outlines the overall terms of the employment relationship between a specific employer and employee, is signed by both the employer and employee, and contains reciprocal promises by both parties that are legally enforceable. It usually supersedes any offer letter, and will usually include some or all of the provisions discussed below. Both the offer letter and the contract are between the specific employer and employee. Employee handbooks describe the employer's policies and procedures and maybe details of benefits and time off. Unlike offer letters or employment contracts, employee handbooks do not usually lend themselves to being tailored to a specific employee and his or her circumstances and, usually is not signed by either party. The handbook does not usually create a contract between the employer and employee, although it may contain certain statements that courts deem to be legally enforceable promises. Such promises however, are most often enforceable against the employer only.

What is [Employment-At-Will](#), and how might having a written contract change that status?

Employment at will allows either the employee or the employer to end the employment relationship at any time for any lawful reason or even no reason. Mere existence of a written employment contract does not nullify employment at will. A written contract with a minimum employment term (e.g. two years) or that only allows termination for cause *will* change the at-will status. In fact, written employment contracts, and sometimes employee handbooks, will often contain specific statements that the employee is and remains an employee at will. Employers seeking to maintain employment at will status should say so in writing. (Please note: At the time of this writing, the [National Labor Relations Board](#) has taken aim at at-will provisions included in employee handbooks. The Emplawyerologist will discuss employment at will in next week's post.)

What are arbitration clauses and are they enforceable? Arbitration clauses require employees to submit certain disputes to [binding arbitration](#) rather than filing a lawsuit. Arbitrators can award the same relief (money or injunctions) as a judge or jury can. Such agreements or clauses are enforceable if written properly. Minimally, courts require such clauses to clearly state when and under what circumstances an employee must submit to arbitration. Courts also require that such provisions not be unduly one-sided. I will be discussing arbitration provisions in an upcoming post, so stay tuned!

Do I need confidentiality and non-solicitation provisions in my employment

contract? Maybe... What exactly is the nature of your business? Who are your clients? Do you have a customer list that contains information not easily available to the public? Do your employees have access to that information? You can contractually prohibit him/her from divulging that information or using it in a way that might hurt you or your business. Do you have a unique sales method? That might be what you call proprietary information. Again, a confidentiality/non-disclosure provision may provide invaluable protection. If you own a business with a special formula, such as [Pepsi Cola](#), the formula would be known as a trade secret that you would want to protect, again, with confidentiality/non-disclosure provisions. You should also restrict access to any confidential/proprietary information or trade secrets to those

who need to know it in order to satisfactorily perform their job. Could an employee start a competing business and take your hard-to-replace employees and customers? Include a well-drafted non-solicitation clause, and restrictive covenant (see below) in your employment contract.

What is a non-compete? Is it enforceable? A non-compete, aka a restrictive covenant, restricts employees or business partners from starting or working for competing businesses, usually within a certain mile radius of the existing business, and for a certain amount of time after leaving their current employment/business situation. Non-competes attempt to restrict the former employee's ability to use any special training or confidential or proprietary information to which s/he gained access while with the former employer, to the former employer's detriment (aka "unfair competition"). In most states, restrictive covenants are enforceable to the extent they are "reasonable" and necessary to protect an employer's legitimate business interests.

My former employee worked on an invention with me that is not yet patented. Can s/he steal the invention? The following clauses can protect employers in this situation: 1. a clause stating that your company retains the title to all inventions, know-how, formulae, that s/he works on or has access to while employed by your company; and 2, a clause stating that all inventions, formulae, technology etc that the employee develops on your time, your premises, at your behest and with your resources are works-made-for hire. This is another likely topic for a future Emplawyerologist post.

Did I mention that next week's post will discuss employment-at-will in more detail? I did? Great! See you next week!

This topic, too, will appear in an upcoming post.

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2. [david schek](#) on [October 17, 2012 at 10:40 am](#) said: [Edit](#)

Hi Janette,

Very good information. I am glad you are sharing it with us. I will be looking forward for future blogs.

All the best

David

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