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Run for Cover(age)

By: Julie R. Rubin

It was only 11 a.m., but I could not keep my mind on work. Not with those leftovers waiting for me in the refrigerator. Come on, noon! I'd slaved all weekend making a traditional Daube de Boeuf Provençale, or beef stew. This is not just any old stew with any old beef. This takes days to get right, to eek out all the flavors. So, there I was, trying to work, urging Father Time to shake his tail. And then the phone rang. At long last, a distraction!

"Julie, I've got Bob Finton on your line," my assistant chimed. "Hi, Bob, how you doing?" "Well, I'm still kicking, but I been better. I will say that." Bob is the CEO of a commercial security devices company headquartered in Bel Air, Maryland, that employs about twenty people. A few weeks earlier, Bob's company had been sued by a former employee claiming violation of Maryland's wage and hour law for failure to pay overtime. Bob called me when he was served with the lawsuit and I advised him to contact his insurance carrier immediately. His company was hemorrhaging cash like every other business muddling through the economy and the last thing he needed was to spend precious money on legal fees. I was quite sure the company's liability insurance would cover this type of claim.

I was half right. The policy – a fulsome general liability insurance policy – did include wage and hour claims, but not my client's. The policy specifically says that coverage may be denied (1) if the "insured fails to demonstrate proof of a written policy covering the subject of the claim," and (2) if the insured could not demonstrate that the policy had been distributed *prior* to the events giving rise to the lawsuit. Basically, if Bob couldn't demonstrate that the company had, for example, an employment handbook that addressed overtime wages, and that the handbook had been distributed to employees before the events complained of in the lawsuit, insurance coverage could be denied. So much for cost cutting.

Bob had been referred to me when the lawsuit began, so I had not yet had time to get on my soapbox about employee handbooks. If only I had been his lawyer before all this hootenanny began overtime. My clients hear “handbook” and a faraway, glazy stare comes over them. Employee handbooks are like watching wallpaper peel, I know, but – and if you’re a regular reader, you’ve heard me say this before – employee handbooks can be your get-out-of-jail-free card.

Aside from providing valuable, practical day-to-day guidance on employee-management relations and workplace dos and don’ts, employee handbooks can be powerful defensive tools in discrimination and other employment legal claims. Trust me, I’ve got the stories to prove it (good and bad, alike). Not only do judges, the Equal Employment Opportunity Commission, and the Maryland Commission on Human Relations look favorably upon employee handbooks, handbooks have become nothing short of a legal necessity to avoid liability. Some courts have held that the absence of an employee handbook is akin to having no policy at all, which can cripple a company defending an employment lawsuit.

The letter from the carrier denying coverage quoted the section of the policy regarding denial of the claim on the basis of the absence of a written policy, and enclosed a copy of Bob’s signed application for coverage. The application specifically inquired: (1) “Does the Applicant have an employment handbook?”, (2) “Does the Applicant have a written anti-discrimination policy?”, (3) “Does the Applicant have a written wage and hour policy?”, (4) “Does the Applicant have a written ‘at-will’ provision in the employment application or handbook?”, and, my personal favorite, (5) “Does the Applicant use outside employment counsel for employment advice?” Bob answered no to all. Although the insurer had issued a policy to Bob’s company (albeit at a heightened premium), the policy expressly disclaimed coverage obligations in the absence of a written policy on the subject of the claim. There was really nothing Bob could do. The language was plain and he did not have a written policy.

But not all was lost for Bob. The case settled out of court after documents exchanged during litigation revealed that, while still employed by my client, the plaintiff had started his own security company, diverted Bob’s customers to his own company and pocketed the cash. Bob got lucky, but you might not. Insurers may issue your company a liability policy even if your company doesn’t have its workplace policies in order, but read the fine print. Issuance of a policy is a far cry from extending coverage. Don’t find out the hard way.