HOW REASONABLE IS "REASONABLE"? THE SEARCH FOR A SATISFACTORY APPROACH TO EMPLOYMENT HANDBOOKS

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ABSTRACT

Although courts, in considering the enforceability of employment handbooks, have relied on a single source of principles, contract law, their inconsistent approaches have produced inequitable and irreconcilable results. This Note argues that courts should abandon their dependence on contract law when analyzing handbook claims and instead adopt an employment-based approach that balances the needs of employers with the realistic expectations of employees. Accordingly, this Note proposes three rules for analyzing the legitimacy of handbook modifications: (1) employers should always be permitted to unilaterally modify handbooks; (2) employers must provide employees reasonable notice, defined as a length of time set by the type and importance of the promise made in a handbook, before modifying a handbook; and (3) handbook disclaimers should be ignored, as they often have inequitable results for employees and employers alike.

INTRODUCTION

Employment at will is the default rule in American employment,[1] permitting either the employer or employee to terminate their relationship at any time for "good reason, bad reason, or no reason at

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1. MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 12 (2005).

all."[2] Yet courts have increasingly chipped away at the presumption of at-will employment, in particular due to its often harsh and unfair impact upon employees.[3] A notable example of this trend is the so-called "handbook exception" to the at-will doctrine, under which employers who issue handbooks to their employees may create enforceable, implied contracts that negate the presumption of at-will employment.[4] Quite commonly, employers provide their workforce such manuals—detailing the policies and procedures of the company, which may include everything from dismissal procedures to compensation rates—but no written contract. In the absence of an express agreement, employees are sometimes left without a remedy when a dispute over the work relationship arises. In such situations, the handbook is often the primary, or only, source of contractual terms.[5] Recognizing the possibility that handbooks can impose binding obligations upon the employer—for implicit or explicit promises made in the handbook—thus helps ensure a degree of fundamental fairness in the relationship between employer and employees.[6]

But the evolution of handbook jurisprudence has generated much disagreement. Not only do courts differ widely in the effect they

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2. Bellum v. PCE Constructors, Inc., 407 F.3d 734, 741 (5th Cir. 2005); *see also* Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884) ("All [employers] may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.").

3. *See, e.g.*, Fulford v. Burndy Corp., 623 F. Supp. 78, 80 (D.N.H. 1985) (holding that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good"); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (holding that "when an employee is discharged solely for exercising a statutorily conferred right an exception" to the at-will employment rule operates); *see also* Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachment on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197, 201–02 (1990) (describing challenges to the rationale for the at-will employment rule).

4. Jason A. Walters, Comment, *The Brooklyn Bridge Is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree's Assent*, 32 CUMB. L. REV. 375, 375, 378–79 (2002). Other prominent exceptions to at-will employment include tort claims based on public policy and an implied duty of good faith. *Id.* at 378.

5. *See, e.g.*, Brown v. Sabre, Inc., 173 S.W.3d 581, 588–89 (Tex. Ct. App. 2005) (holding that an employee to whom promises of vacation time had only been made in a manual with a disclaimer was not entitled to relief as there had been no breach of contract).

6. *See* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) ("All that . . . [is] require[d] of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises.").

grant employment handbooks—some still do not recognize them as legally binding upon the employer at all[7]—they vary greatly in the legal framework within which they analyze the issue.[8] For example, many courts rely exclusively on what they regard as traditional contract law, whereas others base their results on public policy.[9] The result is a hodgepodge of various results and analytical methods: often courts achieve the "right" result for doctrinally questionable reasons,[10] even though others achieve decidedly unfair or impractical results for technically correct reasons.[11]

To comprehend the enormity of the confusion for courts, employers, and employees, consider the following example: "Tim" is an at-will employee with no written contract. He received a handbook in his first week on the job, in which all employees were guaranteed a minimum of three weeks of paid vacation per year, albeit by means of a fairly elaborate compensation scheme tied to seniority rights. This system had long been company policy and was one of the main reasons Tim took the job. The handbook, however, contained a disclaimer near its end, stating that nothing in the handbook regarding compensation should be considered an offer. Six months later, Tim's employer provides a modified handbook stating that employees will no longer receive any paid vacation, although vacation time presently accrued may still be used. After Tim's employer does

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7. *See* Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988) (en banc) (holding that the "unilateral act of publishing its handbook was not a contractual offer to its employees").

8. Most courts claim to apply traditional contracts principles; however, their specific applications of contract law and the attendant results are not uniform. For a full discussion, see *infra* Part I.B.2.

9. W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 11 (2003).

10. Some courts permit unilateral modification of handbooks by an employer, but only if reasonable notice is provided to the employee, although requiring such notice conflicts with fundamental contracts principles. *See, e.g.*, Asmus v. Pac. Bell, 999 P.2d 71, 73–74, 81 (Cal. 2000) (finding that two years after a unilateral modification was sufficient reasonable notice). For further discussion of the problems posed by this approach to unilateral modification of handbooks, see the discussion *infra* Part I.B.3.b.

11. Courts strictly applying traditional contract principles often allow employers to unilaterally modify handbooks which had previously created contractual agreements, sometimes without even providing reasonable notice. *See, e.g.*, Progress Printing Co. v. Nichols, 421 S.E.2d 428, 429, 431 (Va. 1992) (holding that although an employee had originally received a handbook containing a just cause promise, he reverted to being an at-will employee when he signed a form stating he was at will and he gave consideration by continuing to work for the employer).

not pay him for his next vacation, he sues for the amount he would have received under the terms of the original handbook.

Courts approach problems such as this in one of several different ways. First, absent a clear intention from the employer to form a contractual relationship, the handbook could never have created an offer in the first place, and so Tim has no recourse.[12] Second, the handbook could have potentially created an offer, but the disclaimer effectively prevented it from doing so, and Tim has no recourse.[13] Third, the disclaimer could be ignored—because of ambiguities in the disclaimer such as whether paid vacation is really compensation-related and because of the long-standing practice of the employer—and the employer must provide Tim with additional consideration to change the handbook.[14] Thus, Tim is entitled to three weeks' paid vacation for as long as he works there. Fourth, the handbook did create a valid offer, but the employer may modify it at any time without additional consideration, and Tim has no recourse.[15] Fifth, the handbook did create a valid offer and the employer could modify by providing "reasonable notice"; Tim has recourse only if the notification was not reasonable.[16]

Although the potential outcomes in this example are mostly uniform—Tim would most likely lose in four of the five instances—the analyses behind the results vary significantly. As a result, slight changes to the fact pattern could have enormous consequences. For example, if the original handbook had no disclaimer but the subsequently modified handbook did, some courts would grant Tim a contractual right in that first handbook's terms and require the

12. *See, e.g.*, *Johnson*, 745 S.W.2d at 662 (holding that a reasonable employee would not interpret general language and a disclaimer in an employment handbook as an offer to modify an at-will employment agreement).

13. *See, e.g.*, Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 287–89 (Iowa 1995) (holding that an "explicit disclaimer[]" in an employee manual barred the formation of a valid offer to modify at-will employment status).

14. *See, e.g.*, Dillon v. Champion Jogbra, Inc., 819 A.2d 703, 708–09, 13 (Vt. 2002) (holding that a disclaimer that preceded a description of the employer's termination policies was too ambiguous to create a clear at-will employment agreement).

15. *See, e.g.*, Grovier v. N. Sound Bank, 957 P.2d 811, 815 (Wash. Ct. App. 1998) (characterizing an employee handbook as "a unilateral contract . . . in which the promisor does not receive a promise in return as consideration").

16. *See, e.g.*, Asmus v. Pac. Bell, 999 P.2d 71, 78 (Cal. 2000) ("The general rule governing the proper termination of unilateral contracts [created by employee handbooks] is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required.").

employer to provide consideration to modify.[17] On the same facts, other courts would hold that unless a handbook represents a clear contractual offer, it cannot create binding obligations upon the employer, and so Tim has no remedy.[18] Consequently, the underlying method with which a court approaches handbook jurisprudence makes a phenomenal difference, and courts are far from finding any uniform methodology.

The differing, and often contradictory, ways in which courts confront handbooks arise from a pervasive and fundamental mischaracterization of the employment relationship: the connection between employer and employee has wrongly been treated as one of contract rather than status.[19] Even when they entirely disagree on the outcome in handbook cases, nearly all courts analyze the situation as a contractual dispute.[20] But by rigorously applying contract law to employment cases when the fit is at best awkward and at worst misguided, the result is an unhappy marriage in which the employment relationship is harmed by inequitable results while contract law is warped into an undesirable shape.[21] Consequently, a strict contract-based analysis of the validity and interpretation of employment handbooks should be abandoned in favor of a common-sense approach that acknowledges the employment relationship as one of status.

In response to the dilemma, which is perpetuated by a mischaracterization of employment as a contractual relationship, this Note proposes three foundational rules for analyzing handbooks:

1. Employers should always be allowed to modify their handbooks upon reasonable notice without any further burden, such as providing "additional consideration."

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17. *See, e.g.*, Demasse v. ITT Corp., 984 P.2d 1138, 1144 (Ariz. 1999) (holding that "an implied-in-fact employment term must be governed by . . . traditional contract law" including offer, acceptance, and consideration).

18. *See, e.g.*, Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988) (en banc) (opining that "[a]n employer's offer must be stated with greater definiteness and clarity" than in the employee handbook at issue).

19. For a thorough discussion of employment as a status rather than contractual relationship, see Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 42–47 (2003).

20. Walters, *supra* note 4, at 379. Several jurisdictions rely on public policy to find handbook promises binding. *Id.*

21. Snyder, *supra* note 19, at 35–36.

2. The length of advance notice required for modification to be "reasonable" should depend upon the nature of the promise being amended.
3. Disclaimers should be irrelevant in determining whether a handbook, or its subsequent modification, is enforceable.

Part I of this Note outlines the doctrinal confusion courts have created by treating the employment relationship as one of contract rather than status. Part II further explains the three proposed rules. Finally, Part III illuminates these rules by providing several examples of how they would alleviate doctrinal confusion and thus aid both employers and employees.

I. CONFLICTING APPROACHES TO HANDBOOK ANALYSIS

A. Inconsistent Approaches by Courts Using Contract Law

Although many courts have considered the topic, handbook jurisprudence has developed only since the 1970s[22] and results are far from consistent. As a threshold matter, courts do not agree on the basic point of whether manuals can ever provide an exception to the at-will arrangement.[23] The range spans from courts essentially holding that it is never possible to create contractual obligations through a manual,[24] to those holding that manuals can give rise even to property interests.[25] Nevertheless, almost all courts find that handbooks can—under various circumstances—create contractual obligations upon the employer that obviate the at-will default.[26] These courts, however, continue to disagree over the legal analysis that should govern handbook cases.

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22. Brian T. Kohn, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 810 n.66 (2003).

23. *Compare* Johnson v. Nat'l Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) ("[A handbook is] 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 [employer's] unilateral act of publishing company policy."), *with* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1265–66 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) (finding a handbook enforceable in accordance with the reasonable expectations it gave the employees).

24. *Johnson*, 745 S.W.2d at 661–62 (finding that a handbook was "merely an informational statement of . . . self-imposed policies").

25. Thomas v. Ward, 529 F.2d 916, 919 (4th Cir. 1975).

26. Walters, *supra* note 4, at 379.

The vast majority of courts finding that handbooks can create binding obligations on an employer do so under a theory of unilateral contracts.[27] The basic analysis is this: by issuing an employment manual, the employer creates an offer that the employee accepts and provides consideration for by continuing to work.[28] But recognizing that handbooks can give rise to contractual obligations presents an even more challenging problem: specifically, in what manner may employers, having thus created additional employee rights, later limit or rescind those rights by amending or replacing the handbook? Despite claiming to apply the same jurisprudential approach (unilateral contracts), courts have reached fundamentally opposite results that generally fall into one of two schools: those that require additional consideration from the employer before the manual may be modified and those that do not.[29] Although courts on both sides claim that their approach is ultimately rooted in contract law,[30] the two approaches produce very different results.

Both approaches are appealing for various reasons but in some instances result in gross inequity or impracticality.[31] Permitting employers to unilaterally modify their handbooks allows them to discard important promises, such as job security, with little or no notice to their employees.[32] In contrast, employers who must provide additional consideration before they can modify a handbook may be saddled in perpetuity with outmoded policies that they cannot effectively change, perhaps because some employees hold out or the cost to placate all employees is too high.[33]

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27. *Id.* at 382. A handbook exception has also been recognized for public policy reasons in *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 892 (Mich. 1980).

28. Slawson, *supra* note 9, at 21. Some courts, in contrast, use a bilateral contracts analysis, requiring that employers receive the employee's consent to modify; this approach is incorrect, however, as an employer who issues a handbook does not exchange promises (the hallmark of a bilateral exchange) with the employee, but rather awaits the employee's return promise, i.e., continuing to work. *See* Walters, *supra* note 4, at 384–85 (discussing various approaches by courts to modifications of employment contracts).

29. Walters, *supra* note 4, at 375–76.

30. Kohn, *supra* note 22, at 840 ("Neither the courts in favor of or against unilateral modification of implied employment contracts provide any justification firmly rooted in contract law for their positions. Nevertheless, a majority of the courts on both sides of the issue claim their decisions are grounded in traditional principles of contract law.") (footnotes omitted).

31. *See* discussion *infra* Part I.B.

32. *See, e.g.*, Grovier v. N. Sound Bank, 957 P.2d 811, 813–17 (Wash. Ct. App. 1998). For a complete discussion of the facts of this case, see *supra* notes 81–85 and accompanying text.

33. *See, e.g.*, Doyle v. Holy Cross Hosp., 708 N.E.2d 1140, 1142–45 (Ill. 1999). In that case, several nurses terminated in 1991 sued a hospital to enforce termination procedures originally

The result is great confusion among employers and employees, who have no firm sense of what rights may or may not exist due to company manuals, and among the courts, which have no uniform answer to give. These disparate and unsatisfactory outcomes result from the doctrinally incorrect and normatively troubling application of contract law in the employment context. Specifically, the confusion that characterizes handbook jurisprudence emanates from courts who overzealously apply contract principles—such as "consideration," "meeting of the minds," and "offer and acceptance"—when determining the legal weight of an employment manual.

B. The Undesirable Application of Contract Law in the Employment Context

Employment law and contract law are in many ways strange bedfellows. Although a basic tenet of modern employment law is that the employment relationship is at heart a contractual one,[34] employment was not historically regarded as such,[35] and contract law was not regarded as the proper tool for upholding the employment relationship. Problems that arise in the context of employment law often stem from the misguided application of contracts to the workplace.[36] Changing how courts fundamentally view the employment relationship would be a positive step in achieving doctrinally consistent and just results. Perhaps they have just seen employment and contract lying side-by-side for so long that they have grown accustomed to the oddity.

Applying contract law to employment cases in general is undesirable for four reasons: (1) it is inconsistent with the historical separation of contract and employment law; (2) it is theoretically misguided as contract and employment law attempt to accomplish far

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disseminated in a handbook issued in 1971. *Id.* at 1142–43. The court found that subsequent modifications to the handbook changing those policies were unenforceable because they lacked additional consideration, and so the hospital was obliged to follow the original terms. *Id.* at 1145. For companies as large as a hospital, it may be practically impossible to ever modify handbooks because recognizing each employee's date of hiring and acceptance of the handbook's new terms will be necessary for the employer to enforce the modification.

34. Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 1 (2003).

35. *See* Snyder, *supra* note 19, at 36–39 (explaining the historical origins of employment law).

36. *See id.* at 35 (detailing how "contract law frequently does a poor job of dealing with employment law issues").

different goals; (3) it is normatively inappropriate to unite the two, as evidenced by the undesirable outcomes seen by various courts' treatments of handbook cases; and (4) it encourages courts to employ handbook disclaimers dispositively, often in a particularly unfair manner.

1. *Historical Separation of Contract and Employment Law*. Contract law and employment relationships grew from distinct and separate geneses. Contracts originated to protect commercial actors (buyers and sellers) in voluntary transactions for the purpose of encouraging and making more efficient commercial exchanges.[37] On the other hand, employment law emerged from the necessity of regulating the relationship between master and servant.[38] Thus, the employment relationship was, at its origin, one of *status* and not *contract*.[39] This status-based approach to the work relationship—in which the servant labored for the master, who in turn looked out for the servant's health and well-being[40]—was gradually subsumed by the view that employment was in fact a contractual arrangement,[41] one that was best served by an absolute freedom for both parties to do as they pleased. The transition was consummated by the widespread adoption of the at-will rule in the mid-nineteenth century.[42] Yet although the at-will rule fostered the growth of American industry in its infancy,[43] a major lingering effect has been the harm of workers coping with a labor market that no longer exists in the paradigm of full-time, long-term, and stable employment.[44] Accordingly, courts

37. *Id.* at 39.

38. *Id.* at 36–39.

39. *Id.* at 36. In analyzing the nature of the employment relationship, Professor Snyder is making a descriptive and not a normative argument: "I am not arguing that [employment] *should* be a status relationship, merely that it has been one since time immemorial and continues to be treated so today, regardless of the legal theories applied." *Id.* at 34.

40. Pratt, *supra* note 3, at 198.

41. Snyder, *supra* note 19, at 43–44.

42. CRAIN, KIM & SELMI, *supra* note 1, at 9.

43. Pratt, *supra* note 3, at 200.

44. CRAIN, KIM & SELMI, *supra* note 1, at 51. Increasingly, employers have dismantled the traditional market model (viewing employment as lifelong or long-term) in favor of one regarding employment as short-term, in which highly mobile and autonomous workers change jobs fairly often (the median job tenure is only four years for workers at least sixteen years old). *Id.* at 67. Consequently, workers are more susceptible to downsizing, lay-offs, and other corporate realignments. *Id.* Additionally, the workplace has witnessed the decline of the seniority principle, which determines entitlement to fringe benefits by the worker's seniority. Such systems have traditionally protected workers with the most invested in the company—and

have more frequently found exceptions to and ways around the unjust consequences of the at-will rule.

2. *Theoretical Difficulties in Applying Traditional Contract Principles to Employment.* Although the merging of employment law with contract law may have proved beneficial to industry, it was by no means a perfect, or even appropriate, match. Using contracts to deal with employment issues often makes for a poor fit—as one commentator has summed it up, in applying contract law to the employment relationship, "We are trying . . . to fill a round hole with a square peg."[45] On a fundamental level, employment law and contract law attempt to accomplish different goals, and forcefully merging the two can produce muddled and unjust results while having deleterious effects on both. Unsurprisingly, courts and commentators therefore struggle to apply traditional contract law to handbook cases.

The most glaring disagreement is over how employers, having issued a handbook, may subsequently modify or rescind any promises contained therein. Those courts that conclude handbooks create binding contractual promises on the employer that cannot be modified without providing additional consideration to the employee base their analysis primarily on the notions of offer and acceptance.[46] They argue that although an employer can regard silence as acceptance of the initial issuance of a handbook—because rights are only being created—an employee's continuing to work after the modified handbook was issued does *not* constitute acceptance of the offer contained in the amended handbook, and the modification is not binding.[47] Instead, the employee must "necessarily demonstrate[] his consent to the proposed modification of the preexisting

presumably with the lowest mobility—from unfair or harsh treatment. *Id.* at 72. Its collapse leaves workers, especially long-term workers, in a much more vulnerable position. *Id.*

45. Snyder, *supra* note 19, at 36.

46. *See, e.g.*, Torosyan v. Boehringer Ingelheim Pharm., 662 A.2d 89, 99 (Conn. 1995) (holding that an employee does not accept the terms offered in a modified handbook merely by continuing to work); Pratt, *supra* note 3, at 221 (discussion the analytical steps under this method).

47. *See, e.g.*, Thompson v. Kings Entm't Co., 674 F. Supp. 1194, 1199 (E.D. Va. 1987) ("As with all offers, an offer embodied in an employee policy handbook may be accepted or rejected by the offeree-employee. . . . Requiring an offeree to take affirmative steps to reject an offer, however, is inconsistent with general contract law."). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1979) (discussing the inability of an offeror "to cause the silence of the offeree to operate as acceptance").

contract."[48] The underlying premise behind this position is that in its absence employees would simply have no way to enforce the rights they gained from the manual in the first place.[49] Yet a majority of courts permit unilateral modification of handbooks by an employer; these courts find that the employer's modification represents an offer that the employee accepts by continuing to work.[50] The practical difference in these approaches is that a requirement of additional consideration presumptively favors the employee challenging the new handbook, whereas unilateral modification strongly favors employers wanting to enforce the changed terms. Nevertheless, both sides claim that traditional contract principles favor their position.[51]

This general confusion stems from a basic, theoretical error made by the courts: employment and contract law serve different doctrinal purposes, and so applying contract law in employment situations is fundamentally inappropriate. Although the employment relationship resembles a contract in that two independent actors are in essence agreeing to exchange labor for compensation,[52] this simple paradigm is far from representing the many nuances of the employment relationship.[53] For instance, many at-will employees do not have a written contract; rather, they make an oral or implied agreement to work for their employer.[54] Typically, employment agreements are deliberately left incomplete to provide each party with the flexibility it desires in approaching the work relationship, and, more so than other contractual bargains, the employment relationship depends upon implied terms.[55] Because of this extraordinarily open-ended arrangement, it appears that the "agreement" between employer and employee is not a contract at all but rather a mutual decision to enter into a master-servant arrangement in which both parties implicitly

48. *Torosyan*, 662 A.2d at 98.

49. *See, e.g.*, *id.* at 99 (noting that if additional consideration is not required when employees are presented with a new manual, "[t]he employee's only choices would be to resign or to continue working, either of which would result in the loss of the very right at issue").

50. Slawson, *supra* note 9, at 11.

51. Kohn, *supra* note 22, at 840.

52. Snyder, *supra* note 19, at 33.

53. Arnow-Richman, *supra* note 34, at 1.

54. Clyde Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 504 (1997); Donna Young, *Racial Releases, Involuntary Separators, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 357 (2001).

55. Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the U.S. and England*, 8 U. PA. J. LAB. & EMP. L. 883, 887–88 (2006).

recognize the flexibility needed by the other but rely upon the other to act appropriately for their mutual benefit.[56] Accordingly, employment law, more so than contract law, attempts to do what is right by the parties rather than strictly enforce the terms of the bargain.[57]

In contrast to the goal of regulating and protecting the parties engaged in a status relationship, contract law is premised on enforcing the agreements of parties without regard to their particular status or circumstances.[58] Although generally employment law wants to protect and accommodate a reasonable working arrangement among the parties,[59] contract law is willing to uphold the fringe or idiosyncratic preferences of individual actors.[60] Even though the two areas of law overlap to a great degree, they do have underlying differences in goals and justification, which make their application in the other's field oftentimes uncomfortable. Ultimately, continually applying contract law to employment situations harms the doctrines and principles behind both sets of law.

Contract law is often bent into bizarre shapes when forced to tend to employment issues; for example, the sticky concept of promissory restitution evolved from an attempt to "do the right thing" in an employment case when no valid contractual remedy existed.[61] In *Webb v. McGowin*,[62] an employee saved his employer

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56. *See* Arnow-Richman, *supra* note 34, at 2 ("Employees anticipate that their work obligations will develop and change over time, and they know they must oblige instructions and assignments that may exceed the bounds of any static job description. In return, they expect employers to abide by the letter and spirit of their official and unofficial promises, exercising managerial discretion equitably and making exceptions to the company policy where appropriate." (footnote omitted)).

57. *See* Snyder, *supra* note 19, at 48 ("Our status notions with respect to employment are so strong that they tend to give us a powerful message as to what the 'right' result ought to be in a given case, regardless of the specific agreement of the parties.").

58. *Id.* at 41.

59. *See* Pratt, *supra* note 3, at 216 ("Concerns of fairness and an increasing willingness to examine the employment relationship with approaches 'more adopted [*sic*] to the realities of the workplace' . . . . is part of a . . . . continuing erosion of the American Rule that increasingly takes into account the rights of employees and the public." (footnotes omitted) (italics added)).

60. *See* RLS Assocs. v. United Bank of Kuwait, 380 F.3d 704, 709 (2d Cir. 2004) (noting that so long as an exchange has occurred, most agreements will be upheld because "[c]ourts do not inquire into the value or adequacy of the consideration," which "may be minimal—even a peppercorn").

61. *See* Snyder, *supra* note 19, at 49–52 (explaining how the contract doctrine of promissory restitution arose out of the situation in *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935)).

62. *Webb*, 168 So. at 196.

from life-threatening injury and in doing so permanently injured himself.[63] The employer responded by agreeing to pay him a pension for the rest of his life.[64] After the employer's death, however, his estate refused to continue payment to the employee.[65] Because there were no workers' compensation statutes at the time, the employee was without a remedy.[66] To provide one, the court fashioned a contractual solution even though there was no mutual consideration in the classic contracts sense. That solution was its holding that the employer's moral obligation to pay, combined with the material benefit of the employee's saving his life, created a contractual obligation.[67] Because the holding in *Webb* has subsequently been applied outside the employment context, contract law encompasses this expanded and much less precise definition of consideration and thus makes the application of contract law in general less clear.[68]

Although contract and employment theories significantly overlap, it is preferable that judges divorce the two rather than continue this charade.[69] Courts should be willing to formulate rules governing the employment relationship without relying on a contractual theory to support them. For handbooks analysis, this means moving away from contractual approaches; for example, it means ignoring handbook disclaimers entirely, even if in contract law courts ordinarily abide by all the terms an agreement contains.[70]

3. *Normative Problems with a Contractual Approach to Employment*. Relying exclusively on either of the two predominant approaches—requiring additional consideration or allowing unilateral modification by the employer—creates substantial normative problems. For instance, insisting that employers provide additional consideration before modifying their handbooks would likely discourage employers from issuing handbooks at all—even when their procedures would clarify employees' rights—as businesses would be

63. *Id.* at 196–97.

64. *Id.* at 197.

65. *Id.*

66. Snyder, *supra* note 19, at 50.

67. *Id.*

68. *Id.* at 52.

69. *See id.* at 34 ("[C]ontract law seems to be applied differently in employment cases than in cases involving commercial transactions.").

70. For a complete discussion of why disclaimers should be ignored entirely, see *infra* Part II.B.3.

trapped into rigid, inflexible business practices. On the other hand, permitting unilateral modification by an employer allows business owners to make all sorts of grand promises that have no binding effect, enticing employees to start or continue working only to have those promises whisked away at the employer's whim.

a. Additional Consideration Required for Modification. Those who support requiring additional consideration point out that employees rely on handbooks and that employers expect them to do so; thus, it is counterintuitive to think that employers would be "harmed" by forcing them to abide by the policies they purposely promulgated in the first place.[71] For instance, in *Toroysan v. Boehringer Ingelheim Pharmaceuticals*[72] the plaintiff employee agreed to work for the employer in part because of the manual's promise that he could only be fired for cause.[73] Consequently, the court held that the manual created rights for the employee, rights which could not be subsequently reduced without providing the employee additional consideration.[74] Moreover, if employers derive some benefit from issuing handbooks, they should not be able to avoid the costs incident to that benefit; they owe the employees something upon changing those procedures that provided the employer with some benefit from the employees.

Yet it makes little sense practically to require employers, who decide of their own accord to issue a statement of the company's policies to then provide consideration to later modify that policy. Employers have no obligation or duty to issue a handbook in the first place, so having done so, they should be allowed to modify or rescind the handbooks at their own discretion, assuming they have made clear their intent not to form a binding contract. Rather, the point of handbooks is to help both employer and employee by making the conditions of the workplace more uniform and clear without limiting the employer's ability to alter those conditions in the future as deemed necessary. Moreover, from an economic perspective, it is

71. *See* Doyle v. Holy Cross Hosp., 708 N.E.2d 1140, 1147 (Ill. 1999) ("Employers who choose to set forth policies in employee handbooks and manuals as an inducement to attracting and retaining a skilled and loyal work force cannot disregard those obligations at a later time, simply because the employer later perceives them to be inconvenient or burdensome.").

72. Toroysan v. Boehringer Ingelheim Pharm., 662 A.2d 89 (Conn. 1995).

73. *Id.* at 98.

74. *Id.* at 98–99.

(arguably) inefficient to prevent employers from unilaterally modifying their own company policies once implemented.[75]

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."[76] 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.[77] For instance, a company might owe some of its employees who had accepted a modification no guarantees of process before dismissal, even though others could only be fired after progressive discipline, as they had never agreed to the additional consideration offered to modify an original handbook. The result would be to discourage employers from issuing handbooks altogether, or alternatively to provide manuals with especially vague terms and conditions. Consequently, the benefits gained by employees from having manuals[78]—even in the absence of concrete, legally enforceable rights—would be lost.

Advocates of employee rights, however, could counter that businesses frequently self-impose situations in which they owe differing obligations to various employees, such as individualized pay rates. Consequently, the risk of owing different handbook-originated

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75. Businesses, like market conditions, are ever-changing. If handbooks create rights for employees that cannot be unilaterally changed, then businesses would face significant obstacles preventing an efficient adjustment to the market. Bankey v. Storer Broad. Co., 443 N.W.2d 112, 120 (Mich. 1989). Allowing unilateral modification by employers leaves businesses the flexibility presumably needed to meet evolving business necessities. *See* Pratt, *supra* note 3, at 218–19 ("[T]he employer distributes the original handbook seeking to secure good will and increased productivity.").

76. *Bankey*, 443 N.W.2d at 120.

77. Pratt, *supra* note 3, at 219.

78. Employees—like their employers—benefit from an orderly, cohesive workplace in which they (generally) know what to expect, even if those rights are not legally guaranteed. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 892 (Mich. 1980) ("[W]here an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly."); Walters, *supra* note 4, at 381 (noting that employers, through handbooks, "foster a loyal and orderly work environment and help to produce a more productive, cohesive work force").

duties to different employees does not appear to be a great concern. But this argument fails when faced with the underlying purpose and nature of handbooks: to bring clarity and organization to the workforce so that it may be more efficient, orderly, and loyal.[79] Thus, employers who originally promulgate handbooks to structure the workplace would refrain from doing so if they might have the opposite effect of making it less orderly, for example, by owing conflicting duties to various employees. Although differences in pay are often kept confidential[80]—often purposely by the employees themselves—varying handbook duties to employees would presumably be very public and foster discord among the workforce. For instance, employees who accept offered consideration for a modification might view those holding out as troublemakers, whereas "hold-outs" in turn might view the others as caving to the demands of the employer. Thus, the cumulative impact of this rule is to thoroughly discourage employers from creating handbooks in the first place. As a result, those courts that require additional consideration have created—for the vast majority of employers and employees alike—a recipe for disaster.

b. Employers May Unilaterally Modify Handbooks. Yet the other approach commonly used—permitting unilateral modification by the employer—can unquestionably be harsh: employers may make lavish promises to employees through handbooks, enticing them to work or continue to work (perhaps for lesser compensation), and then withdraw those promises at any time for their own convenience. For instance, in *Grovier v. North Sound Bank*[81] an employee starting at a bank received a handbook stating that she would become a permanent employee after passing a probationary period, after which she could only be terminated for just cause.[82] Two years later the bank rescinded this provision and eliminated sick leave as well as holiday and vacation pay.[83] Moreover, the bank told her she would be

79. Slawson, *supra* note 9, at 24; Walters, *supra* note 4, at 381.

80. Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKLEY J. EMP. & LAB. L. 167, 168 (2004) ("[D]iscussion by individuals of their salaries . . . can be seen as violating an American 'social norm.'").

81. Grovier v. N. Sound Bank, 957 P.2d 811 (Wash. Ct. App. 1998).

82. *Id.* at 813–14.

83. *Id.* at 814.

terminated if she did not sign the new handbook within three days.[84] The court upheld her dismissal for refusing to sign, arguing that "[t]he law should not tie employers to anachronistic policies in perpetuity."[85] Likewise, *Sadler v. Basin Electric Power Cooperative*[86] upheld an employee's termination during a company restructuring despite his having been employed for four years and informed via handbook that permanent employees like him could only be fired for just cause.[87] A handbook issued just before his firing defined just cause for the first time as including terminations for company restructuring.[88] The court found for the employer, and it bluntly stated the absoluteness of the unilateral modification rule: "[T]he employer can define the work relationship. Once an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. Because the employer retains this control over the employment relationship, unilateral acts of the employer are binding on his employees and both parties should understand this rule."[89]

In response to the harshness of the rule permitting absolute unilateral modification, which would potentially open the door to all sorts of abuses by employers, the majority of courts permit employers to unilaterally modify only if they first provide reasonable notice to their employees.[90] For instance, the California Supreme Court held in *Asmus v. Pacific Bell*[91] that a written promise of employment security could be unilaterally modified with reasonable notice, and it found that the two years after the promise's modification was "ample" time.[92] Although other courts follow this rule, no definitive statement has been adopted as to what constitutes "reasonable notice."[93] In

84. *Id.*

85. *Id.* at 816.

86. Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988).

87. *Id.* at 296–97.

88. *Id.*

89. *Id.* at 300 (quoting Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984)).

90. Walters, *supra* note 4, at 387.

91. Asmus v. Pac. Bell, 999 P.2d 71, 80 (Cal. 2000).

92. *Id.* at 80.

93. *Id.* ("Employees were provided ample advance notice of the termination, and the present plaintiffs even enjoyed at least two more years of employment."). The Sixth Circuit has said, alternatively, that one month may be valid, *e.g.*, Highstone v. Westin Eng'g, Inc., 187 F.3d 548, 553 (6th Cir. 1999), but also that mere distribution of the handbook counts, Mannix v. County of Monroe, 348 F.3d 526, 536 (6th Cir. 2003). Generally, it appears that courts only

Grovier, for instance, the court stated that reasonable notice meant no more than actual notice, and so an employee receiving a modified handbook alone was sufficient for the unilateral modification to be valid.[94] An immediate concern over this lack of specificity is that if constructive or actual notice of a modification—such as through distribution of a new handbook—is all the notice required, the "reasonable notice" requirement becomes superfluous and dissolves back into the harshness of the pure unilateral modification rule because employers could still take advantage of their employees, just so long as they told them about it. In contrast, by giving employees fair warning of what is to come, the *Asmus* rule dulls the particularly sharp blade wielded by employers under the unilateral modification doctrine.

But this toned-down version of the rule—requiring reasonable notice before unilateral modification is permissible—presents analytical problems. Although the courts that follow this reasoning say they do so applying traditional contract law,[95] that claim rests on shaky legal ground.[96] Assuming the initial issuance of the handbook was a valid offer accepted by the employee's continuing to work, later allowing an employer to modify the handbook unilaterally soundly conflicts with traditional requirements for contract modification: the employee's acceptance of the original offer means that the employer may not revoke because the acceptance creates an option contract that the employer may not unilaterally rescind or alter.[97] Yet the offeror remains free to undo the option contract by providing additional consideration in exchange for its cancellation.[98] Even though the result achieved by the *Asmus* approach may be more fair, the validity of its reasoning under contract principles is tenuous at best. Moreover, the vagueness among courts following this approach over what constitutes "reasonable" notice does little to resolve the confusion over handbook jurisprudence and may at times offer scant protection to abused workers.

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require that the employer make reasonable efforts to notify employees of the change. Apps, *supra* note 55, at 898.

94. Grovier v. N. Sound Bank, 957 P.2d 811, 817 (Wash. Ct. App. 1998).

95. Walters, *supra* note 4, at 407.

96. *Asmus*, 999 P.2d at 82 (George, C.J., dissenting) (arguing that the majority's analysis is "entirely inconsistent with fundamental tenets of contract law").

97. RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981); Walters, *supra* note 4, at 411.

98. Walters, *supra* note 4, at 416–17.

4. *The Unfair Results of Handbook Disclaimers.* A "disclaimer" is exactly what it purports to be, that is, a statement in a handbook that disavows any notion that the handbook creates binding promises upon the employer. The general rule is that an employer can prevent the formation of a contract by making clear its intent not to make an offer, although a disclaimer is not necessarily dispositive.[99] Some courts further require that the language be clear and conspicuous, and much litigation has resulted from whether a statement in a handbook claiming to disavow contractual liability meets the standard necessary to do so.[100] Courts often place great emphasis on the presence or absence of disclaimers. Many, if not most, state that disclaimers usually prevent a handbook from being construed as an offer.[101] The corollary is that the absence of a disclaimer makes the manual presumptively binding.[102] This analysis is not uniform, however. For example, courts sometimes hold that even in the presence of disclaimers, a handbook may create a binding contract if the content of the manual substantially conflicts with the disclaimer.[103] Similarly, the failure to expressly disclaim binding obligations may not have any effect on the analysis.[104] Still, most courts hold that disclaimers expressly denying any intention to create a contractual offer effectively preclude the formation of any contractual obligation by the employer through the handbook.[105]

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99. *E.g.*, Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 287 (Iowa 1995); 82 AM. JUR. 2D *Wrongful Discharge* § 25 (2003).

100. *Anderson*, 540 N.W.2d at 287–88 (emphasizing that "[t]he requirement that a disclaimer be conspicuous has given rise to much litigation" before noting that "[a] disclaimer should be considered in the same manner as any other language in the handbook").

101. Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) (stating that for an employer to avoid creating a contract, "[a]ll that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual").

102. Keith J. Rosenblatt, *New Jersey's Recent Employment Manual Decisions: Traditional Contract Law Abandoned in Favor of an Employee's Unreasonable Expectations*, 25 SETON HALL L. REV. 1496, 1505 (1995) (stating the rule as "absent an adequate disclaimer, an employer may be bound to the 'promises' made in an employee handbook, regardless of an employee's at-will status.").

103. *See, e.g.*, Dillon v. Champion Jogbra, Inc., 819 A.2d 703, 708 (Vt. 2002) ("Notwithstanding the disclaimer on the first page . . . the manual goes on to establish . . . an elaborate system governing employee discipline and discharge.").

104. *See* Bankey v. Storer Broad. Co., 443 N.W.2d 112, 113 (Mich. 1989) ("An employer may, without an express reservation of the right to do so, unilaterally change its written policy [in a handbook].").

105. 82 AM. JUR. 2D *Wrongful Discharge* § 25 (2003).

This approach can, as expected, have particularly harsh consequences. Namely, employees who have either no written contract or particularly vague contracts may receive most of their terms of employment in a handbook containing a disclaimer. These handbooks can make especially grandiose promises regarding anything from compensation to vacation to dismissal procedures, and employees may quite reasonably come to rely on those promises, believing them to be binding. This may be particularly true in situations in which the disclaimer is largely buried, i.e., through placement, font, and the like, but is not legally inconspicuous. As a result, employees may work years under the expectation that certain promises in a handbook are enforceable and then be blindsided without recourse when the employer unilaterally modifies those promises.

In contrast, employers who simply omit a disclaimer—perhaps negligently by not hiring an attorney to read through the manual—yet have no intention of creating binding promises may be bound in perpetuity to quite restrictive, even damaging promises. In particular, promises of "continued employment," which may have been merely statements of good faith on the part of the employer to act fairly, could be construed as statements changing employment from at will to just cause. Thus, employers and employees alike may be unfairly harmed when courts place heavy reliance on disclaimers.

II. PROPOSED RULES FOR HANDBOOK MODIFICATION

A. A Threshold Matter: Why Handbooks Should Be Enforceable

Before discussing what the rules should be regarding modification of handbooks, it is important to answer the threshold question of why handbooks should ever be given legally binding force at all. First, in many instances employee handbooks may provide the only concrete description of the employment relationship. Many employers leave crucially important terms and conditions of an employee's work for a handbook, including terms such as vacation time, bonuses, just cause, disciplinary procedures, and so forth.[106] Refusing to find handbooks enforceable would make any employment remedy in favor of the employee nearly nonexistent, as employers could inequitably put nearly all the promises of the

106. Arnow-Richman, *supra* note 34, at 2.

relationship into the handbook, knowing these promises would be unenforceable.[107] It would be a bizarre rule that would leave judicially unregulated, either contractually or equitably, a relationship as fundamentally important to people's lives as their relationship with an employer. Second, employers issue handbooks for their own benefit.[108] To allow them the advantage provided by the handbook without any reciprocal detriment would smack of injustice. Finally, employees rely on handbooks.[109] Frequently they do so at the insistence of their employers, who often require them to sign or acknowledge receipt or having read the handbook as a condition of beginning employment.[110] Thus, employers expect employees to rely on handbooks and employees are cognizant of that expectation, so enforcing the handbooks' provisions would not be unfairly catching the employer or employee off guard.

B. Proposed Rules

1. *The Requirement of Additional Consideration Is Abandoned, but the Unilateral Modification Rule Must in Turn Adopt a Proper Reasonableness Standard.* Based on the problems discussed,[111] requiring additional consideration is neither practical nor desirable before an employer may modify a handbook; allowing absolute unilateral modification, however, produces unjust and harsh results. The answer is to tone down the absolute modification rule, which

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107. *See* Small v. Springs Indus., 357 S.E.2d 452, 455 (S.C. 1987) ("It is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous, nonbinding statement of general policy' whenever it works to his advantage." (quoting Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 83 (N.C. Ct. App. 1985))); Pratt, *supra* note 3, at 210 ("If company policies are not worth the paper on which they are printed, then it would be better not to mislead employees by distributing them.").

108. Pratt, *supra* note 3, at 213.

109. Courts often use employees' reliance on a handbook's terms as a threshold matter for determining whether the handbook is legally enforceable. *See, e.g.*, Demasse v. ITT Corp., 984 P.2d 1138, 1147 (Ariz. 1999) (holding that commitments in a handbook are enforceable if they may be reasonably relied upon by employees). Other courts are even more categorical as to reliance: "[Having been] issue[d] a handbook, an employee may rely on the provisions to state a claim for relief." Jones v. Denver Pub. Sch., 427 F.3d 1315, 1323 (10th Cir. 2005). That employees sue at all to enforce handbooks suggests that they regarded the handbooks terms as in some way binding.

110. *See* Pratt, *supra* note 3, at 206 ("Some employers require each employee to read and sign her manual.").

111. *See* discussion *supra* Part I.B.3.a.

courts in essence do when they require reasonable notice before unilateral modification, as in *Asmus*.[112] Yet reasonable notice is not the panacea that courts might purport it to be, as no clear notion of what constitutes "reasonable notice" has yet been determined. An ever-present risk remains that by not setting a clear time requirement for reasonable notice, the *Asmus* rule effectively dissolves back into the unforgiving rule permitting unilateral modification at any time. Thus the mission is for courts to ensure that "reasonable notice" is, in fact, reasonable to make its promise of overcoming the harshness of unilateral modification more than illusory.

2. *Defining "Reasonable" Notice for Handbook Modification Depends upon the Nature of the Promise Being Amended*. If the "reasonable notice" requirement of the *Asmus* rule is what prevents the unilateral modification of handbooks from having unduly harsh consequences, what constitutes "reasonable" must be established. The rule dissolves back into its unjust progenitor if "reasonable notice" does not provide an adequate benefit to the employee; in other words, the notice must provide the means by which employees can in some way enforce the benefits they originally accepted by continuing to work after receipt of the manual. Even though several courts have adopted a rule similar to that in *Asmus*,[113] there is yet no uniform approach as to what constitutes reasonable notice.[114] Moreover, there is not a particularly large amount of precedent on this issue. Some courts merely look at the *manner* in which the modification was imparted to the employees, upholding the unilateral change so long as the "method employed [is] uniform and reasonable."[115] They tend to hold that so long as constructive notice is given, the change is valid.[116] Others also look at the *length of time* provided to the employee before the change takes place. For example, in *Asmus*, the plaintiffs were given five months' notice before the policy took effect and worked for two years after the modified policy was in place; the court found this "ample advance

112. *See supra* notes 89–91 and accompanying text.

113. *See* Walters, *supra* note 4, at 398 (noting specifically California, North Dakota, Utah, and Virginia).

114. *See* Apps, *supra* note 55, at 897–98 (detailing various courts' time frames).

115. Grow v. Gen. Prods., Inc., 457 N.W.2d 167, 171 (Mich. Ct. App. 1990).

116. Apps, *supra* note 55, at 898.

notice."[117] Likewise, the Sixth Circuit has said that one month's advance notice was reasonable.[118]

For notice to be reasonable it should meet both prongs, namely, that the modification of the handbook be reasonable in manner *and* time. Accordingly, this Note argues that for notice to be reasonable (1) it must include a time requirement, and (2) the amount of time necessary should vary depending upon the nature of the promise.

a. The Necessity of a Time Requirement. Courts that allow unilateral modification without requiring any time delay before the modification takes effect miss a major point of why reasonable notice should be required in the first place. If unilateral modification is at times unjust precisely because the employer can invoke it at any moment on a whim, then simply requiring the employer to tell employees about the change does not resolve the problem at all. Instead, the employer should be required to allow a sufficient amount of time to give employees fair warning, a period in which they may still assert their rights should the employer attempt to make the modified handbook take effect immediately.

The immediate issue is how anyone can pick a time that is "reasonable." In so doing, a court should necessarily consider the position of the employee, i.e., the time needed to consider the new policy and even find other employment if the changes are unpalatable. At the same time, the position of the employer should be a factor. For instance, any time an employer can show absolute business necessity—more than simply changed business conditions—the modification should be immediately allowed. Finally, the amount of time necessary to be "reasonable" should be based on the type of promise made, as employees likely place much greater importance on some types of promises—for example, those relating to compensation may be more zealously guarded than disciplinary procedures.

A time requirement would resolve the fundamental inconsistency inherent in evaluating employer modification: it would bridge the gap between an employer's intent not to bind itself to handbook policies and an employee's expectations that those promises are not meaningless. Granted it is not a perfect solution;

117. Asmus v. Pac. Bell, 999 P.2d 71, 73 (Cal. 2000) (stating the rule that an employer could unilaterally modify an employment handbook "after a reasonable time, on reasonable notice, and without interfering with the employee's vested benefits").

118. Highstone v. Westin Eng'g, Inc., 187 F.3d 548, 553 (6th Cir. 1999).

employees would still face the prospect that the procedures and policies under which they have been employed may be modified in the future at the sole discretion of their employer. But they would at least know that such changes cannot take place immediately but rather only after they have been given a fair chance to consider what is at stake.

b. The Amount of Time That Is Reasonable Should Vary Depending upon the Promise. The amount of time that is reasonable should depend upon the nature of the benefits at stake, with modifications that involve promises affecting substantive rights requiring longer notice to be valid than those impacting largely procedural rights. For benefits that are largely procedural—such as disciplinary procedures—the amount of time deemed reasonable should be particularly small, for example, perhaps just a few days and no more than one month. This length accords with the reasonable expectations of the employee: although some particular employees might place paramount emphasis on a company's disciplinary procedures,[119] it is doubtful that the majority of employees place as much importance on such promises as they do for substantive ones.[120] Substantive changes almost surely affect employees' personal lives—for instance, by changing compensation or vacation time—whereas procedural changes, like changes to disciplinary procedures for a model employee, may never impact an employee at all. Employees most likely are able to adapt more easily to procedural rather than substantive changes, and so less notice is required.

In either case, the importance of allowing an employer to change its internal operating procedures substantially outweighs the relatively small importance placed upon those policies by the employee. Thus, the requisite time needed to modify should be small. Because one business week is ordinarily adequate for other business-

119. For instance, imagine an employee who previously had been dismissed for a job after cruising the Internet in violation of company policy although the employee was unaware it was wrong to do so. In the future, the employee might be more inclined to accept an offer from a company that requires an initial warning for minor infractions before termination is appropriate.

120. Courts typically do not require actual notice, in part, because employees often do not read their employment manuals at all. *E.g.*, Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 285 (Iowa 1995) (noting that the plaintiff did not read the handbook). But just because employees have not read the manual should not imply that they are not aware of its contents. Employees are probably made aware of major provisions (and violations of them) by other coworkers or the employer itself.

related activities, it seems an adequate minimum for notice to be "reasonable" for handbook modifications. Additionally, it is easy to infer from an employer who feels a compelling need to change a handbook provision immediately (in less than one week) that it is doing so in bad faith or from improper motives. For instance, the employer may be altering commission rates just before several employees complete a large sale. Thus, one week should not be an unreasonable burden upon employers to wait for changes to take effect.

At the other end of the spectrum are those provisions that specifically involve substantive promises, such as statements concerning wages, raises, and bonuses. Employees who have already performed work under a promise of compensation made in an employment manual should always be entitled to that pay. Courts should be most hesitant to allow employers to modify these promises on short notice as they are undeniably fundamental to the employment relationship. Employees who have their compensation altered are probably much more likely to consider seeking employment elsewhere than those who have procedural rights changed and hence need adequate time to do so. An adequate period may be one business quarter, or roughly three months. This span is a basic unit by which businesses measure their recent productivity and make fundamental business decisions concerning their future actions.[121]

Troublesome situations arise when employees are promised procedures that directly affect substantive rights, such as rules that provide for standard-track promotions, raises, advances, etc. These circumstances necessarily involve a blend of procedure and substance, making it more difficult to determine the weight that should be accorded such provisions. Consider, for example, a fairly typical employment manual that sets forth the conditions for applying for and receiving tenure for a college professor. Here the rules specifically concern the procedure that is to be followed by the college and the professor in the course of the employment relationship, but they also significantly impact the professor's

121. *See* ANDREA SAVERI ET AL., INST. FOR THE FUTURE, TOWARD A NEW LITERACY OF COOPERATION IN BUSINESS: MANAGING DILEMMAS IN THE 21ST CENTURY 53 (Maureen Davis ed., 2004) ("Entrepreneurial capitalism, typified by the United States, is rooted in individual entrepreneurialism and free market principles, organized around the business quarter as its main timeframe.").

substantive rights, notably the professor's promotion, salary, and job security. In such circumstances, the amount of time necessary would be more fact dependent, but the general principles would still apply.[122] The proper time frame for such promises would fall in between the two time frames mentioned, i.e., one week to three months, and could be adjusted toward either end of the range depending on whether the change is more procedural or more substantive.

Promises that an employee can be terminated only for just cause are similarly problematic, for this situation too deals with rights both substantive (being fired) and procedural (allowing the employee notice and a hearing). These cases would likely be highly fact dependent. Ordinarily, courts should be wary about attributing too much weight to supposed just cause provisions, as employers may commonly include language that resembles such a promise but without the intention of changing the employee's status from at will.[123] Instead, the employer is simply stating its own desire, in general, not to dismiss employees without reason, but it is by no means binding itself. Nonetheless, when courts do find that provisions in a handbook give rise to a promise that an employee can only be fired for just cause, modification should require a reasonable amount of time equal to that of changed compensation, that is, one business quarter, as just-cause provisions are closely akin to promises of payment.[124]

As recommended in this Part, ordinarily the shortest time that could be considered "reasonable" should be one week, and the longest necessary would be three months. Yet several circumstances could alter these periods. Specific cases may, in the interest of justice for either the employer or employee, require either a shorter or longer span respectively. Additionally, employers should be allowed to show that they follow a separate, internal practice to essentially establish their own standard intervals. For instance, a company with regular two-month reviews that are used to establish compensation would have a legitimate argument that the three-month threshold for unilaterally modifying wage provisions in a handbook should be

122. For a more complete discussion of what constitutes "reasonable notice" in this situation, see *supra* Part III.C.

123. Employers may make statements of their general desire not to fire people, such as "So long as your work is performed satisfactorily, you will always have a place at Company X." This sort of statement, however, is probably better characterized as simply an offer of good will than any real intention to create a binding just-cause contract.

124. For example, employees may elect to take lower pay with the expectation that they cannot be fired without good reason.

reduced to reflect its own adopted two-month period. Such an approach on the surface would be reasonable as employees would have come to reasonably expect it. In the absence of mitigating circumstances or specific employer practices, the suggested guidelines could be applied across the board.

Case law justifies such an approach, as various courts have implicitly adopted a reasonable *length of time* approach to finding an employer's unilateral modification valid.[125] Nevertheless, this Note's approach is difficult to square with traditional contract principles.[126] Applying contract law strictly to handbook cases would have either of two negative effects: (1) employers would have to provide additional consideration to modify, which is undesirable, or (2) courts trying to do the right thing in employment cases would further bend contract law into bizarre shapes. Consequently, courts should be willing to abandon their reliance on contract law as a beacon to guide them through the fog of employment decisions. Searching for a reasonable time requirement is not a contract-based solution but rather one founded on notions of fairness uniquely aimed at the employment relationship.

3. *As a Further Step toward Fairness, Disclaimers Should Be Entirely Irrelevant.* An initial step toward achieving the goal of fundamental fairness would be to eliminate from handbook analysis the typically heavy reliance courts place on the existence or absence of disclaimers. Those cases that follow the majority approach regarding disclaimers—using them effectively as a per se rule against finding an implied contract in a handbook—reveal the underlying problem behind looking at disclaimers in general: disclaimers are weighted too heavily. In reality, disclaimers say very little about the intentions of the employer issuing the handbook or the employee relying upon it. The argument in favor of a bright-line rule is that disclaimers reveal the employer's true intent to avoid creating a contract and that no reasonable employee could therefore conclude the handbook was an offer.[127] Employers generally would prefer that

125. *See supra* note 93 and accompanying text.

126. *See* discussion *supra* Part I.B.

127. Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 287–88 (Iowa 1995) ("A disclaimer can prevent the formation of a contract by clarifying the intent of the employer not to make an offer. . . . [W]e simply examine the language and context of the disclaimer to decide whether a reasonable employee . . . would understand it to mean that the employer has not assented to be bound by the handbook's provisions.").

disclaimers prohibit the creation of a contract, for they would almost always prefer to limit their liability to their employees.[128] The problem, then, is that employers can promise too much if they know they can always avoid being contractually bound. Courts, of course, do recognize this and sometimes ignore disclaimers in such instances.[129] Yet by viewing disclaimers as an absolute bar or even presumptively favoring them, courts implicitly favor the position of employers; i.e., they unfairly reduce or eliminate employer liability to employees despite the benefits gained by the employer in issuing the handbook. At the same time, courts may sometimes penalize businesses that simply omit a disclaimer or do not word it strongly enough. It is difficult to understand why, if courts assume that employers generally do not want to be bound by the terms in their handbooks, the presence (or absence) of language stating exactly that becomes determinative. If courts recognize the competing forces at issue behind all handbook litigation—employers' desire to disclaim and employees' reliance on the handbook—there is no compelling reason to consider disclaimers beyond unnecessary reliance on traditional contract analysis.[130]

In addition to the basic unfairness of allowing disclaimers to preclude liability is the practical problem that examining and creating rules governing when disclaimers are effective is a legal mess. Courts analyzing handbooks for implied contracts usually take a two-step

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128. Professor David Slawson argues that employers would prefer the additional consideration for unilateral modification rule as it would provide a tool for retaining employees. Slawson, *supra* note 9, at 30, 32. His argument is unpersuasive for two reasons: first, an employer who did want to expressly provide a just-cause provision to employees could do so through a written contract separate from the handbook; and, second, employers who want to retain employees through promises in a handbook would simply not violate those promises (by unilaterally modifying them) in the first place.

129. *E.g.*, Dillon v. Champion Jogbra, Inc., 819 A.2d 703, 708 (Vt. 2002) ("[T]he presence of such a disclaimer is not dispositive . . . .").

130. This overemphasis on disclaimers is another regrettable result stemming from the union of contract and employment law. Specifically, disclaimers are used by courts as evidence of what a reasonable employee would believe the bargain to be; in other words, it is considered part of a contract between individual parties. Employment manuals—often the only source of terms defining the employment relation—should, however, be considered representative of the symbiotic employer-employee relationship. Yet, Professor Slawson takes the position that unilateral modification without additional consideration should be allowed provided an employer "had the foresight to reserve the right to do so." Slawson, *supra* note 9, at 28. This position demonstrates the basic problem: if courts are more concerned about achieving equitable results in employment than ordinarily with contracts, simply having the "foresight" to add one or two lines to an otherwise voluminous employment manual should have very little determinative weight.

analysis: first, they inquire whether a disclaimer is valid, and if so, they turn to whether the handbook has created a binding contract.[131] The type of analysis used when looking at disclaimers is particularly tedious. Courts often determine a disclaimer's conspicuousness by examining everything from the language and placement of the disclaimer to its font, size, color, and location.[132] Because the presence of a disclaimer is often not determinative as a matter of law of whether a contract has been formed or not,[133] courts' analysis of handbooks requires an extra step in litigation, i.e., initially determining the validity of the disclaimer. In addition, courts' decisionmaking processes become much more subjective as they must inquire whether a reasonable employee would have found the particular disclaimer at issue sufficiently conspicuous to avoid creating a binding contract.

Entirely disregarding disclaimers could eliminate much of the uncertainty involved in handbook jurisprudence. In addition, such a step would free courts from the often minute and tedious inquiries they must make concerning the clarity of a disclaimer. In the end, the use of disclaimers flows completely from the application of contract law to the employment situation—their presence indicates the employer's desire *not* to create an offer. Recognizing the employment relationship as one of status would allow courts to abandon this overemphasis on disclaimers, which has particularly unjust results by absolutely denying employees entrance to the courtroom.[134]

C. Objections to These Rules and Their Responses

Immediate concerns with the rules proposed in this Note include the possibilities that (1) employers who modify many provisions in a handbook would face practical difficulties because each change would

131. *See, e.g.*, *Anderson*, 540 N.W.2d at 288–89 ("When examining the disclaimer we first consider the text employed. . . . Second, we examine the scope of the disclaimer.").

132. *See, e.g.*, Durtsche v. Am. Colloid Co., 958 F.2d 1007, 1010–11 (10th Cir. 1992) (rejecting a disclaimer that "was buried in a glossary definition, and there was no effort to highlight the fact or the effect of the disclaimer"); Chambers v. Valley Nat'l Bank, 721 F. Supp. 1128, 1131 (D. Ariz. 1988) (enforcing a disclaimer displayed conspicuously in bold print in introductory paragraph); Kumpf v. United Tel. Co., 429 S.E.2d 869, 872 (S.C. Ct. App. 1993) (holding a disclaimer inconspicuous when "located on the last page of the document under the heading 'CONCLUSION'. . . . [because] [i]t was neither capitalized, bolded, set apart with distinctive border, or in contrasting type or color").

133. 82 AM. JUR. 2D *Wrongful Discharge* § 25 (2003).

134. For further detail on the sometimes unjust results that reliance on disclaimers can have, see *supra* Part I.B.4.

require a different length of time before it would be "reasonable"; (2) a good faith standard applied to employer modification could more easily achieve the same desirable results; and (3) ignoring disclaimers would dissuade employers from ever issuing handbooks at all, which would in turn harm employees.

An initial concern with the approach suggested by this Note is that because the length of time required for modification to be reasonable depends upon the nature of the provision changed, different lengths of time would have to pass before all of a handbook's provisions would become valid. The result, therefore, would be a staggered effect in which various modifications are permitted at varying intervals. Analogously, under the additional consideration approach, employers might potentially owe different obligations to different employees depending upon who received what version of the handbook and who has accepted the modification. Under this Note's approach, employers could face a comparable situation in which they modify a handbook's provisions regarding disciplinary procedures, just-cause provisions, and compensatory promises at once, and as a result, the amount of reasonable notice required for each modification would differ. The worry is that this would be confusing for employers to administer and difficult for employees to understand.

There are several counterarguments. First, the modified handbook would still be uniform among the employees, so it would avoid the primary evils of the additional consideration approach. Specifically, employers would not have to administer policies that affect individual employees differently, and employees would not face the internal discord that may arise when they are treated differently by the employer depending upon who has agreed to the new handbook. Second, the employer would know when its various modifications come into effect, so it would not be particularly troublesome to implement administratively. Similarly, employees would benefit from the more bright-line knowledge of what fair warning they deserve from employers wishing to modify the terms of their employment. Third, claims likely would arise only when the lack of notice was egregious concerning one of the provisions in the contract, and so courts would not have to sort through various time issues for each provision of the handbook. Finally, this approach would fairly represent the reasonable expectations of both parties, in particular the employees. Simply put, it is more reasonable to expect

that an employer can flexibly alter its procedural policies than its pay schedules.

Another objection is that the concept of good faith, if rigorously applied, could likewise eliminate the rough edges of the unilateral modification rule.[135] More specifically, courts could apply a good faith standard to the acts of employers, prohibiting unilateral modification in instances when an employer's act was duplicitous, e.g., altering commission rates just before an employee closes a large sale or eliminating a large promise intended to attract employees. If so, then traditional contract principles could continue to be applied without doctrinal inconsistency or the problem of unfair results. Good faith fails, however, because it takes into account only the employer's position. Thus, employers who grossly abuse their use of employment manuals to make promises to employees would be prohibited from doing so under the good faith doctrine. But employers who act in good or neutral faith in modifying their manuals would still be able to do so without providing reasonable notice. For example, an employer may state in a handbook that all employees may only be fired for just cause; one year later, however, the employer feels an economic downturn coming and returns all employees to at-will status. Doing so would not be in bad faith—nonetheless, immediately modifying the employees' status without reasonable notice is unjust to them. In this analysis, employees' positions are entirely ignored; demanding that employers provide fair warning is more a safeguard to protect employees than it is to ensure that employers are not acting for improper motives.

A final objection concerns the practical effect of denying handbook disclaimers any legal force. Opponents of this Note's position might readily counter that by removing any legal significance from disclaimers, employers would be less likely to issue handbooks at all, thus discouraging a practice that benefits employees as well as employers. Employers could not be certain that the handbooks would not create binding obligations. There are several counterarguments. First, employers might still issue handbooks when they find that the benefits derived from them outweigh the risks of litigation involving one of the handbook's promises. Due to this fear of litigation,

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135. *See* Apps, *supra* note 55, at 916 (arguing that good faith can limit how employers may modify a handbook, because good faith requires that the employer only exercise its power "in a manner which does not destroy the relationship of mutual trust and confidence between the parties").

employers issuing handbooks would probably make their language more precise and contain less lavish promises, in effect promoting the goal of clarity in the employment relationship. Second, as argued in this Part, employers should be allowed to modify unilaterally upon reasonable notice, and so even if they are bound for a time, they would always be able to subsequently modify without providing additional consideration. Hence, the benefits of the handbook would seem even greater next to the prospect of abiding by the handbook's promises for at least the short term.

III. CONFLICTING APPROACHES TO HANDBOOK ANALYSIS

This Part provides three examples of fairly common workplace arrangements and ensuing employer-employee conflicts. For each, it illustrates how courts might resolve the conflict under various approaches, and then demonstrates how courts should decide the matter following the rules proposed by this Note.

A. John

An employee, John, works as a salesman on a commission basis; his pay rates have been specified only in an employment handbook he received two years previously. He received no written contract. The handbook contains a disclaimer, which states only that "The company's Sales Plan does not constitute an offer by Company X." The rate of compensation he receives is highly favorable compared to other employers in the market, and so John has turned down other attractive job offers. Presently, he earns 30 percent for each sale he makes, but his employer issues a new handbook reducing that amount to 10 percent starting in two days. John is presently working on a sale which he thinks will be completed in one week. He sues four months later for all the commissions he was denied at the 30 percent rate after the new handbook was issued.

The approaches taken by various courts could decide this in one of several different ways. First, without a clear intent to form a contract, the handbook could not have created an offer in the first place, and so John has no recourse.[136] Second, the handbook might have created an offer, but the disclaimer effectively prevents it from

136. *See, e.g.*, Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 661 (Mo. 1988) (declining to adopt a "handbook exception").

being so, and John has no recourse.[137] Third, the disclaimer could be ignored in light of the nature of the other promises in the manual and the employer must provide John with additional consideration to change the handbook.[138] Thus, John is entitled to the 30 percent rate for all sales. Fourth, the handbook did create a valid offer, but the employer may modify it at any time without additional consideration, and John has no recourse.[139] Fifth, the handbook did create a valid offer and the employer could modify by providing "reasonable notice;" John has recourse only if the notification was not reasonable.[140]

Besides illustrating the multiple and conflicting approaches taken by different courts, this example is a simple vehicle for demonstrating the flaws of courts' present approaches to handbooks. A categorical refusal to find handbooks binding on employers would be unfair to employees, like John, whose pay rates have only been established by a handbook. Allowing an employer to evade liability by grace of a clearly worded disclaimer similarly reproduces this problem. But requiring Company X to provide additional consideration to all salesmen would be a tremendous burden on the employer. For example, if the employer settles with most of its salespersons but John holds out for more, the employer may be left in the unenviable position of having various members of its sales force receiving various compensation rates, which would be administratively difficult and could foster disgruntled feelings among the employees. Yet allowing the employer to unilaterally modify the handbook is also unsatisfactory. John has remained loyal to his employer specifically because of the excellent pay rates he receives; in addition, he is about to receive a large commission which the employer erases by modifying the handbook. The most attractive solution, therefore, is

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137. *See, e.g.*, Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995) (holding that an explicit disclaimer bars a handbook from constituting an offer to modify an employee's at-will employment).

138. *See, e.g.*, Demasse v. ITT Corp., 984 P.2d 1138, 1144 (Ariz. 1999) ("Once an employment contract is formed . . . a party may no longer unilaterally modify the terms of that relationship.").

139. *E.g.*, Grovier v. N. Sound Bank, 957 P.2d 811, 815 (Wash. Ct. App. 1998) ("An employer may unilaterally amend or revoke policies and procedures established in an employee handbook.").

140. *E.g.*, Asmus v. Pac. Bell, 999 P.2d 71, 73 (Cal. 2000) ("An employer may unilaterally terminate a policy . . . after a reasonable time, on reasonable notice . . . .").

adopting a "reasonable notice" standard for the employer's modification.

Following the rules proposed by this Note, a court evaluating this case should initially discard the disclaimer as irrelevant to the analysis. Then, it should determine the type of promise at issue—in this case, a substantive compensatory provision, which, as suggested, should receive maximum deference for the length of time required to be reasonable. Here, the employer provided notice of only one week, which ordinarily should be regarded as insufficient warning to the employee of a change affecting compensation. The drastic size of the change (30 percent to 10 percent) indicates that John may very well desire to find a more attractive position elsewhere and should receive sufficient time to do it. In the absence of showing an actual business need, the employer may be trying to unfairly profit by its employees' previous reliance on the high commissions, further indicated by the fact that John is about to close a large deal just days after the changes will take effect.

As a result, John should be entitled to the 30 percent commission rate for all of those sales made in the three months after notice of the change was made. For the sales made in the fourth month, the court should determine that John's notice was by then reasonable and that he is entitled to only the 10 percent commission rate. Although this result is not doctrinally sanctioned by contract law, it is more reasonable to both parties than results that would have entailed a harsh result to either John or his employer.

B. Jane

Jane goes to work for a manufacturer and receives a one hundred-page handbook. She acknowledges receipt of that handbook in writing. The employer makes no other oral or written promises to her. The handbook does not include a disclaimer, and it describes the process by which Jane may become a permanent employee at the company. Specifically, her first ninety days are her "probation period," after which she will be evaluated, and if her work is acceptable, she will be offered a "permanent position for as long as she chooses to remain with the company." One year later, the company issues a revision to the manual stating that all employees are at will and that the handbook is not meant to create a binding contract with any employee. Jane is fired in another six months, despite having passed her probationary period. She sues, claiming

that she is a permanent employee who, under the terms of the manual she signed, can only be fired for just cause.

Under the rules proposed in this Note, Jane's employer should be entitled to summary judgment. The absence of a disclaimer in the initial handbook should be disregarded by the court, as should the later addition of a disclaimer. Next, because her termination occurred sufficiently far after the modification (six months), she received reasonable notice of the employer's unilateral modification, and so it was valid. In the absence of a clear contractual agreement changing Jane's status from an at-will employee, Jane gained no further rights through the initial handbook and so has no recourse.

But under other analyses, this case might not be so simple. For instance, courts that place heavy weight on the absence of a disclaimer would probably conclude that initially the handbook created a binding, implied contract and so Jane is entitled to damages.[141] Thus, the employer is penalized for neglecting to include an initial disclaimer. And if the ultimate objective is fundamental fairness, it seems odd to hold one employer liable and another not based solely on the inclusion of a one-sentence disclaimer at the end of a one hundred-page manual. Practically, it is doubtful that Jane's expectations changed dramatically based on the absence or inclusion of the disclaimer. Similarly, if the employer truly wanted to create binding obligations upon itself, it could have done so expressly; instead, holding it liable is a large penalty to pay for a relatively slight oversight.

Even after placing analysis of the disclaimer to the side, courts would still reach widely disparate, and often unjust, results. In jurisdictions that require additional consideration for modification, Jane's continuing to work after receiving the modified handbook is insufficient to constitute acceptance, and so she would win damages. On the other hand, courts that adamantly refuse to recognize handbooks as ever creating employee rights would dismiss the case outright. Both approaches claim to use black-letter contract law in deciding Jane's case, yet they reach diametrically opposed results. As a result, contract law becomes less clear, and employees and employers alike face uncertain outcomes when deciding whether to litigate.

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141. *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) (finding a just-cause provision in a handbook enforceable when no disclaimer is present).

In addition, other courts may get bogged down in the specific language of the initial provision offering "permanent employment," debating whether a reasonable employee would deem that a promise that she would only be fired for just cause.[142] Still others, like the court in *Asmus*, might reach the same conclusion suggested by this Note—summary judgment for the employer—but would attend to the tedious contract analysis involving the disclaimer and whether an offer and acceptance had actually occurred in the first place.

The unfortunate result in all of these other contexts is that the arguably fair result, permitting the employer's modification without penalty, requires a much greater degree of legal legwork before it is reached. Thus, the courts' time and resources are wasted on particularly tedious and jurisdictionally inconsistent analysis. This harms the courts, employees, and employers alike.

C. Fred

Fred receives a written contract as a professor at a local university, but it states only his salary for the present year. Typically, he renews a similar contract each year. Fred also receives a handbook which is reissued every year, detailing the procedures that both professors and the university's board are to follow in deciding whether faculty will receive tenure. Fred is halfway through the process, which ordinarily takes six years. The handbook he receives this year, however, is decidedly different from previous versions he has received. This handbook entirely overhauls the tenure track procedures, providing simply that after this semester, the university will make tenure decisions at its own discretion. Fred is denied tenure without being informed why and sues, claiming the university owed him the process it had previously established.

In this case, courts that follow traditional contract principles, that is, those that require additional consideration or even use promissory estoppel, seem to get this right: the university cannot alter the promises it made to Fred because an option contract was created when Fred continued to teach under the promises of the initial handbook. Thus, the university must provide the procedures it had originally put in place for Fred. But because the additional consideration approach is generally unsatisfactory,[143] other courts

142. *See supra* note 132.

143. *See* discussion *supra* Part I.B.3.a.

might turn to the *Asmus* rule of reasonable notice. Here, Fred has probably received reasonable notice—an entire semester and constructive notice—under a contract-based approach. Yet this solution is undesirable based on the extent of what Fred has lost: several years of work and preparation have vanished. Likewise, courts that outright reject obligations arising from employment handbooks would unfairly deny Fred any remedy.

What would be preferable, therefore, would be an "employment," rather than contract, reaction to whether Fred has received reasonable notice. This is not an easy case to resolve, even under this Note's approach. For instance, allowing Fred to continue his tenure track on the terms of the original contract—which he wants—would force the university to abide by outdated policies for another three years, policies which would not apply to other professors. On the other hand, a court's decision that six months' time is normally adequate notice would deny Fred a remedy entirely. The "best" result would involve either creative, equitable relief by which Fred would receive some form of the process he was denied, or compensatory relief for the value of the time he has spent under the assumptions of the original handbook. No clear solution appears; this approach, however, points the way toward the two parties settling, rather than providing either with an easy victory that would unfairly and one-sidedly harm the other.

Although this Note's approach is fairly open-ended in this case, it offers a chance to avoid the harshness and rigidity of the two options contracts analysis offers, either requiring complete obeisance by the university to the terms of the original handbook or rejecting Fred's claim entirely.

CONCLUSION

To reduce the often harsh and unjust impact that an employer's use of manuals can have upon employees, a majority of courts recognize that employers who issue handbooks to their workforce may create contractual obligations.[144] But courts remain largely divided on the legal analysis that should be used in approaching the issue of an employer's obligations flowing from the issuance of a handbook and the more problematic question of what happens when

144. *See* Pratt, *supra* note 3, at 216 ("[T]he majority of states . . . recognize a handbook exception.").

that employer later attempts to unilaterally modify the promises therein. Most claim to resolve the question using traditional contract principles; even when applying the same terms and approaches, however, these courts often reach entirely opposite results.[145] This unsatisfactory result in large part stems from the unfortunate blending of employment and contract law, which produces cases squeezing contract law into a shape it was not meant to fill. The most palatable approach that courts have adopted is that used in *Asmus v. Pacific Bell*, in which the court held that unilateral modification is permissible so long as reasonable notice is provided.[146] Yet this rule is difficult to reconcile with traditional contract principles[147] and no standard definition of reasonable notice has been developed.[148]

Employment handbooks necessarily involve two competing interests: employers generally prefer that handbooks not give rise to binding obligations, whereas employees prefer that they do. The reasonable expectations in this relationship probably fall somewhere in between. At its simplest, this Note proposes adopting the *Asmus* rule—under which employers may unilaterally modify handbooks so long as they provide reasonable notice—and determining the length of time that is "reasonable" based upon the particular term at issue in the handbook. The length of time sufficient for notice to be reasonable should depend upon the nature of the manual provision: substantive changes, such as to compensation, require greater advance warning than those affecting procedures, such as internal company policies. This Note suggests that, ordinarily, the shortest time that could be reasonable is one workweek, and the maximum is one business quarter or three months. This rule would retain employer flexibility while limiting the harshness of the unilateral modification rule that otherwise would permit the employer to promise nearly anything to its employees only to revoke such

145. Walters, *supra* note 4, at 384–85. *Compare* Demasse v. ITT Corp., 984 P.2d 1138, 1145 (Ariz. 1999) (finding an employer's unilateral modification of a handbook provision invalid after applying uniltateral contracts analysis and noting "[c]ontinued employment after issuance of a new handbook does not constitute acceptance"), *with* Sadler v. Basin Elec. Power Coop. 431 N.W.2d 296, 298 (N.D. 1988) (finding an employer's unilateral modification of a handbook provision valid after applying unilateral contracts analysis and noting "[t]he employee's retention of employment constitutes acceptance of the offer of a unilateral contract").

146. Asmus v. Pac. Bell, 999 P.2d 71, 73 (Cal. 2000).

147. Apps, *supra* note 55, at 915 ("[T]he reasonable notice requirement cannot be a part and parcel of the fact that contracts are unilateral.").

148. *See* discussion *supra* Part I.

promises on a whim in the future. Finally, handbook disclaimers should be irrelevant in handbook analysis, as they provide little to no added insight to the intentions of the parties but often permit gross unfairness on the part of employers toward employees.

On a deeper level, however, this Note additionally proposes that courts should no longer cling to the safe harbor provided by contract principles; rather, they should embrace the concept of employment as status and consequently be willing to find the solution that is most equitable among the parties and not necessarily the "contractually" correct result. For so important and fundamental a relationship in the lives of people as the work relationship, it is of the utmost importance that courts seek to hold parties to basic notions of fairness. For handbooks, achieving fairness means delving into the fundamental nature of how they are used and impact the employment relationship; for employees and employers alike, handbooks typically mean greater stability, order, and efficiency in the workplace. But although employers should not be forever bound to antiquated policies disseminated through handbooks, employees should not be unjustly harmed by employers who can revoke any handbook promise on a whim. The solution for both is one of flexible, reasonable notice and ultimately greater fairness in employment.