

Best Practices for Handbook Reviews in a Changing Legal System

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Topics We'll Cover

- What to look for when you audit your handbook;
- How to preserve the at-will employee/employer relationship;
- What handbook policies should or should not be included for legal compliance
- Adapting those policies to deal with changing technology (such as electronic communications policies, blogging policies and social media policies).

Employee Handbooks

- If you have one, Handbooks are the foundation of the employment relationship and become part of the culture.
- Initial impression of your company by applicants, employees and often external agencies and juries is your handbook.

Why Have a Handbook?

- 1. Motivation - A handbook which describes the company's goals, how employees help the company meet its goals, and provide employees with a sense of their importance to the business.
- 2. Reference - With a well-written handbook, everyone knows the rules of the workplace. If an employee violates a rule, reference to the handbook can make discipline easier. In addition, the handbook's rules can provide objective evidence to support termination or discipline.
- 3. Protection - When discrimination and unemployment claims are brought against the business, a handbook will show an investigator that clear, reasonable rules of conduct in the workplace were communicated to employees and objectively enforced.

Key Questions

- Have you considered whether you need a handbook?
- What is the goal of your handbook?
- How do you distribute your handbook?
- How do you acknowledge receipt?
- How long ago prepared?

Key Questions

- Do you have multiple jurisdictions?
- Do you have legally required sections?
 - FMLA
- Do you have key legal sections?
 - EEO/Discrimination
 - Electronic Communications
 - Drug/Alcohol
- How often reviewed?

What Your Handbook Needs

- Disclaimer / Employment-at-Will Statement
- Harassment Policy
- Equal Employment Opportunity Statement
- Open Door Policy
- FMLA Policy
- Drug Free Workplace Policy
- Discipline Policy

What Your Handbook Needs

- Vacation / Holiday Policy
- Leave Policy
- Attendance / Punctuality
- Introductory Period

Policies To Think About

- Social Media
- Statement On Unions
- Nepotism / No Dating Policy
- Inspection Policy
- Internet / E-Mail Policy
- Bulletin Board Policy
- Solicitation Policy
- Military Leave

Policies To Think About

- Bereavement Leave
- Jury Duty
- Moonlighting
- Visitation / No-Access Policy
- Dress & Appearance
- Workplace Violence
- Peer Review

Illegal Policies

- Prohibition on Discussing Pay
- Union Statement + Promise to Follow Handbook
- Total Prohibition on Solicitation
- Automatic termination upon exhaustion of FMLA leave for own serious health condition

Unwise Policies

- HR Procedure Policies
- Vacation Accrual Without Limitations
- Mandatory Language
 - "Must"
 - "Shall"
- Unnecessary Specificity
 - Too Many Details Can Cost You \$\$\$\$!!

Right to Modify

Include It In Your Disclaimer

I have read and understand that this handbook does not create a contract of employment, and I agree to read the employee handbook that I have received. ***Further, I understand that the handbook may be modified by my employer at any time for any reason, even though it may result in a reduction of benefits from prior handbooks, policies, or practices.***

Employee Signature: _____

Equal Opportunity Policy

This Company is an Equal Employment Opportunity Employer and makes all employment decisions without regard to race, color, religion, sex, gender, national origin, citizenship, age, or disability. Opportunity for employment with this Company depends solely on qualification and performance.

The Company's policy of equal employment opportunity and nondiscrimination extends to recruitment, employment, advancement and promotion, compensation and benefits administration, training and development, and other personnel actions.

Harassment Policy Checklist

- Types of harassment the policy covers.
- Conduct which can constitute harassment.
- How to report harassment.
 - Two persons (one male, one female) to whom employees may report harassment.
 - Avenue of bypass
- Confidentiality, respect, and assistance.
- Need to report harassment.

Harassment Policy Checklist

- No retaliation.
- Claims will be investigated.
- Discipline for those found guilty of harassment.
- What to do if the harasser is a customer or independent contractor.

Open Door Policy

- Misunderstandings or conflicts can arise in any organization and should be resolved before serious problems develop. Most incidents will resolve themselves naturally. Should a situation persist that you believe is detrimental to you or to the Company, however, the Company encourages you to feel free to discuss it with your manager as soon as possible.
- If the problem is still not resolved or is awkward or sensitive circumstances prevent you from discussing your problems with your supervisor or immediate manager, you may go to his or her manager or the human resources department.

Arbitration Agreements

- Benefits
 - Less publicity
 - Early resolution
 - Less cost (?)
- Pitfalls
 - Requiring employee to pay costs
 - Cap on recovery
 - Limit on presentation of evidence
 - "Hidden" agreement to arbitrate
 - Any unfair provision

[Unwise Policies]

Model Dress Code Provision

It is advised that you come to work dressed according to your salary. If we see you wearing \$350 Prada sneakers, and carrying a \$1,600 Gucci Bag, we assume you are doing well financially and therefore you do not need a raise. If you dress poorly you need to learn to manage your money better, so that you may buy nicer clothes and therefore you do not need a raise. If you dress in-between, you are right where you need to be and therefore you do not need a raise.

[Employee Handbooks]

Model Restroom Use Provision

Entirely too much time is being spent in the restroom. There is now a strict 3-minute time limit in the stalls. At the end of 3 minutes, an alarm will sound, the toilet paper roll will retract, the stall door will open and your picture will be taken. After your 2nd offense, your picture will be posted on the company bulletin board under the "Chronic Offenders" category.

[Employee Handbook Policies?]

Personal Days:

Each employee will receive 104 personal days a year. They are called Saturday & Sunday.

[Sample Policies (Obtain Legal Review)]

Acknowledgment / Employment-at-Will

This is to acknowledge that I have received a copy of ABC Company's Employee Handbook. I understand that the Handbook is not intended to be and does not constitute an employment contract. Instead, I understand that, because business conditions change frequently, this handbook is general statement of company guidelines. Further, I understand that ABC may modify any of the provisions of the handbook at any time.

I have entered into my employment relationship with ABC voluntarily. I understand that I am employed on an at-will basis. Nothing in this handbook alters my status as an at-will employee. As an at-will employee, I understand that I am not employed for any specified length of time. I understand that this means that either the Company or I may terminate my employment at any time, with or without cause.

I understand that no representative of ABC, other than its President, has any authority to make any agreement that changes my status as an at-will employee, to offer me employment for any specified period of time, or to offer me any particular terms or conditions of employment. I also understand that any agreement changing my at-will employee status must be in writing and signed by the President.

Employee Signature: _____

[At-Will Employment]

- At-will employment statement
 - At-will
 - No set duration
 - Not a contract
 - Can terminate any time for any lawful reason
 - States who at company can enter into a contract of employment and requires written contract

[Dress Code Policy Checklist]

- Description of clothing which is appropriate for regular work days.
- Description of clothing which is never appropriate.
- Explains casual days.
- Description of clothing which is appropriate for casual day.
- Individual responsible for enforcing the policy.

[Dress Code Policy Checklist]

- Repercussions for violating the policy.
- Exceptions for religion and disability.

[Leave Policies]

- FMLA
- Medical Leave
- Workers' Compensation Leave
- Ensure consistency between policies

[FMLA Policy]

Use the DOL's Poster

<http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>

Then, add the following:

FMLA Policy Continued

Definition of "Leave Year"

For purposes of this policy "leave year" shall be (SELECT ONE OF THE FOLLOWING "the calendar year" or "the 12 month period beginning on ____ and ending on ____" or "the 12 month period measured forward from the date any employee's first FMLA leave begins" or "a rolling 12 month period measured backward from the date an employee uses any FMLA leave).

Call-In Procedures

Normal call-in procedures under the _____ policy apply to all absences from work including those for which leave under this policy may be requested.

[Discipline]

- Progressive?
- Examples
- Case-by-case determination
- No forgiveness

[Drug Testing]

- Compliance with applicable state laws?
- Workers' Compensation Statute
- DOT Regulations

Attendance/Punctuality

ABC Company expects employees to be at work at the start of their shift each day they are scheduled to work. Employees are considered tardy if they have not clocked in by the start of their shift, or if they have not called in within thirty (30) minutes prior to the start of their shift. Failure to call in during your shift may result in discharge. Discipline for tardiness will follow the progressive discipline policy.

It is your obligation to notify your supervisor, as far as possible in advance of your scheduled workday, whenever you will be late or absent, to state the reason for such lateness or absence, and to advise when you expect to return to work. If your supervisor is not available when you call, you must leave a message. The message should include a telephone number where you can be reached. If you are physically unable to make a personal call, you must have someone else call for you. Obviously, following these steps does not excuse the absence, but failure to comply with them can result in a violation of the attendance standard.

[Conflict Of Interest & Anti-Nepotism Checklists]

- Justifications for the policy.
- Who the policy applies to.
- What positions the policy applies to.
- Procedure to report possible prohibited relationships.
- Steps to be taken in the event of a violation.

Inspection Policy

ABC Company is committed to keeping employees safe from harm, including workplace violence, illegal drugs and employee theft. Accordingly, ABC Company takes the position that it can search employees or their property (including desks, cars, lockers, etc.) if there is a reason to suspect dangerous weapons, stolen property, or illegal substances.

[Wage & Hour Issues]

- Safe Harbor Language
- Procedures
- Exempt v. Non-exempt

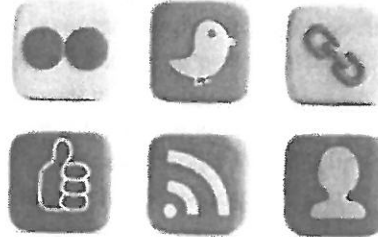
[Electronic Communications Policy]

- Define what systems are covered by the policy, e.g., voice mail, e-mail, Internet, and computer systems and files.
- Make clear that use of employer's computer systems is to be used for business purposes only, and all files and messages are company property.
- If personal use is permitted, prohibit personal use that interferes with employee's work or that of others (e.g., prohibiting non-work related websites such as chat rooms, games, travel, shopping, stock trading, hate/discrimination, pornography, etc.).
- Prohibit inappropriate use.

Electronic Communications Policy

- Prohibit copying and sending any confidential or proprietary information, or software that is protected by copyright and other laws protecting intellectual property.
- Notify employees that any misuse will be subject to discipline, up to and including termination.
- Inform employees that employer may access, search and monitor voice mail, e-mail or company files of any employee that are created, stored or deleted from company computer systems.
- Have employees sign company policy or notice on acceptable usage of employer's computer information systems.

Social Media Policies



Social Media Policy

- NLRB guidance- May 30, 2012
- "Section 7 disclaimer" does not cure an overly broad social media policy. But it's still a good idea to have one).
- "Nothing contained in this policy shall be interpreted or applied in a way that interferes with the legal rights of employees to engage in Section 7 activities."
- Social media policies should give clear guidance and specific examples of acceptable and prohibited conduct.
- Define trade secrets, financial disclosure laws, etc.

Social Media Policy

- Cannot prohibit the posting or publication of complaints or criticism about the company.
- Can limit which employees can speak to the media on behalf of the company, but cannot prevent her from speaking with media on behalf of herself & her co-workers.

Social Media Policy

- Prohibiting illegal conduct online is acceptable--particularly non-discrimination and non-harassment.
- You can prohibit the disclosure of confidential information - maybe.
- For example, the third NLRB report says "don't share confidential information" is unlawful, but "don't post secret, confidential or attorney-client privileged information" is lawful.

What to Remember About Social Media Policies & NLRB

- Key Principles--Concerted activity involves actions by two or more employees or by one taken on behalf of others related to working conditions
- Communication about working conditions and wages are protected regardless of forum (as long as not grossly disloyal, reckless or maliciously untrue).

Who does this decision apply to?

ALL EMPLOYERS, NOT JUST UNION EMPLOYERS

[Handbook Implications from Case Law]

- Damages awarded depend on good faith effort to comply with law:
- implementation of a written policy against discrimination, and
- regular employee training regarding anti-discrimination laws, and
- Prompt response to complaints

[Tracking Handbook and Policy Updates]

- Personnel File Audit
- Initial Hiring Checklist
- Electronic Services
 - allow access 24/7 if in Internet repository
 - instantly disseminate changes
 - reduce printing and shipping costs
 - track employee acknowledgments
 - track and archive policy changes
 - reduce risk

[Tracking Handbook and Policy Updates]

- Attend SHRM Meetings
- Get regular legal updates (subscribe to Constangy blogs, e-mail updates, webinars, etc.)
- Keep informed

[QUESTIONS?]

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