

Employee Handbooks

Employers considering whether they should implement an employee handbook should give careful consideration to a myriad of concerns

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If properly drafted, an employment handbook is more than a collection of policies and procedures. Rather, it is a roadmap for an employer's human resource (HR) and benefit departments. A handbook is often the first introduction an employee has to the culture of his or her new employer and sets the tone for the rest of the employment relationship. It not only serves to define the expectations of the employer, but also informs the employee of the rights and benefits to which he or she is entitled, and the standards of behavior to which he or she is expected to adhere.

The Positives for Employers to Consider

There are many positives and negatives in preparing and implementing an employee handbook. Often these positives and negatives seem to go hand-in-hand. For example, by memorializing a sexual harassment policy or other discrimination policy, an employer may have a defense — or even escape liability — if an employee fails to raise concerns regarding harassment to a supervisor or HR officer as defined by the handbook. Yet, if an employee does seek help pursuant to the steps set forth in the employee handbook and the company fails to respond, it may create the risk of damages. Why then are handbooks becoming such a prevalent element of the employment relationship?

First and foremost, the process of creating an employee handbook requires an employer — or a legal professional the employer has retained — to make an honest evaluation of the employer's existing policies and procedures. Those which are not in compliance with applicable law should be replaced and those which are should be revised to ensure they are as concise as possible and offer the greatest protection possible from future litigation. The ultimate goal is that the employer is left with a set of policies that are not only in compliance with federal and/or state law, but also are specifically tailored to the employer's specific needs, goals and objectives and business model.

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Additionally, a well-drafted handbook can reduce the strain on an employer's management and HR professionals. By reducing its policies and procedures to written form, the handbook can provide standardized information to employees and answer basic questions regarding employees' duties, obligations and benefits. For similar reasons, the creation of standardized policies and procedures can ensure that each employee is treated in a uniform and consistent manner, by providing a step-by-step guide for supervisors and managers when responding to employees' complaints, or when counseling poor-performing or difficult employees.

Finally, the creation and implementation of a handbook can serve to limit an employer's exposure to claims and minimize potential liability. Several federal and state laws, such as the Family and Medical Leave Act, require that an employer provide written notifications to employees of the employer's obligations under the law and the protections and benefits afforded the employee.

By including such disclosures in the handbook, the employer will be able — in most instances — to satisfy the notification requirements. A handbook that provides a mechanism for employees to voice complaints or to resolve disputes may also help the employer avoid litigation. For example, an employer that has created an anti-harassment policy may be able to raise as an affirmative defense an employee's failure to report harassment. Similar defenses may be raised against claims for other types of harassment, such as violence in the workplace, occupational safety and health, etc. The existence of policies prohibiting discrimination and providing a reporting of discrimination may also limit the employer's potential liability. Most importantly, a concise and carefully drafted handbook should serve as a reference manual for managers to ensure that each employee is treated in a consistent fashion, hopefully reducing any claims for discrimination.

The Burdens of an Employee Handbook

In addition to the benefits described above, handbooks place additional requirements on an employer, which some may consider burdens, which should be carefully considered by an employer thinking of implementing an employee handbook.

The creation of a handbook will often require an employer to retain the services of a legal professional or at the very least someone with experience drafting such handbooks, rather than leaving the job to company managers. However, the fees professionals charge for preparing the handbook will often be less than the costs the employer incurs to defend against claims for violations of law or failure to adopt policies necessary to protect its workforce. An inartfully crafted handbook which fails to fully or adequately address legal requirements facing the employer, or which is ambiguous, can be as damaging to the employer as not having a handbook at all.

It is also imperative that the handbook accurately reflects the *actual* policies of the employer. If the company's written policies differ from those that it applies on a daily basis, the company may find itself open to claims for discrimination on the grounds that the company is selective in the application of its policies. An employer should therefore take steps necessary to ensure that managers and other employees with supervisory functions not only understand the policies and procedures set forth in the handbook, but that they use the handbook to guide their actions and decisions. Such steps may include annual training sessions for management and other employees as to the terms and conditions set forth in the handbook.

An employer should periodically review the handbook and revise it as necessary to ensure that it remains in compliance with applicable law and serves the needs of the employer. As an employer grows, or laws change, failure to address these concerns can lead to a deficient handbook. Finally, an employer needs to be careful not to have the handbook turn into a contract, thus forcing additional obligations on the employer.

Ultimately the final decision on whether to implement an employee handbook lies with the employer. However, HR professionals and members of the legal community agree that the benefits of an employee handbook outweigh the disadvantages.

Drafting a Handbook

Having chosen to implement an employee handbook, an employer must then turn its attention to determining what types of policies and/or procedures it should include. These decisions will be based, in part, on the employer's current policies and, in part, upon the evaluation of a legal professional as to what type of policies are needed to comply with federal or state law and to allow the company to grow in the future. This is a dynamic process, which requires collaboration between the company's managerial staff and legal counsel to ensure that the final product is as tailored as possible to the goals and objectives of the company.

Additionally, employers must take a realistic look at the nature of their company and determine whether one handbook can serve the needs of the entire company. The company may do business in several states, thus requiring policies tailored to particular state laws. While it may be more economical to create one handbook, certain employers may find it is less costly in the long run to create different handbooks for each sub-class of employee. For example, multi-state employers may experience problems if they attempt to use the same handbook for all employees without considering whether state rules differ among their different facilities. These employers may do better to create one handbook for its main location, and location-specific supplements to conform to state or local law.

While the ultimate decision on which policies to include in a handbook should only be made after seeking the assistance of legal counsel, following are some of the important provisions that should be included in a handbook. This list is not exhaustive, and may not address the needs of every workforce or conform with state law.

Employment-at-Will

In most states, the prevalent form of employment is "at-will." As this phrase implies, employees who are "at-will" can be terminated at the will of their employer — at any time and for any reason, as long as the reason does not violate the law. A specific agreement between the employer and the employee, very often in the form of an employment contract, can modify the at-will relationship. As such, employers who choose to implement an employee handbook must take care to ensure that the handbook preserves the "at-will" nature of the employment relationship.

Perhaps the most effective way for an employer to defeat a claim that its handbook creates a binding contract is also the most simple — the inclusion of a prominent, conspicuous and clear disclaimer at the beginning of the handbook that states that nothing in the handbook changes the at-will employment relationship, nor creates a contract for employment. Such disclaimers should be set off in some way, such as in

a boxed section or by using capital letters or bold text. Furthermore, this disclaimer should be prominently displayed at the beginning of the handbook.

In addition, a carefully drafted handbook will include similar, supplemental disclaimers throughout the handbook at relevant sections reminding the reader that he or she is employed “at-will.” Such disclosures should be included with any discussion of disciplinary proceedings or any policy that may be construed as conferring a job benefit. As such, these disclaimers help to avoid the impression that employment is “permanent” or “secure” or that the employee may only be terminated “for cause,” or after the company has engaged in some sort of disciplinary or warning procedure.

Anti-discrimination Policies

Anti-discrimination policies, sometimes also referred to as “equal employment opportunity” policies, serve to fulfill an employer’s obligations under federal and state discrimination law to inform employees that the company will not tolerate discrimination and takes steps necessary to eradicate it from the workplace. Specifically, the policy should state that the company provides equal employment opportunities to all employees and applicants without regard to race, creed, color, sex, national origin, etc. as federal and state law provide. The policy should also clearly notify employees that such policy not only applies to employees and management, but rather the company as a whole — employees who fail to comply with the anti-discrimination policy will face discipline, up to and including termination.

In addition, the policy should also set forth a complaint or grievance reporting procedure for employees to raise concerns over conduct that they believe is discriminatory. Regardless of the specific procedure created, employers should use this as an opportunity to advise employees that the process will be confidential — to the extent consistent with a full investigation — and that no retaliation will be taken against employees for filing a complaint in good faith.

Anti-harassment Policies

In addition to an anti-discrimination policy, many employers also choose to create a specific policy prohibiting sexual and other forms of harassment, such as harassment based

Creating a Procedure for Reporting Discrimination or Harassment

- 1) State the employer is committed to creating a workplace free from discrimination or harassment.
- 2) Specifically state that the employer is an equal employment opportunity employer, which provides opportunities to employees consistent with applicable federal, state and local employment and anti-discrimination laws.
- 3) Provide definitions for harassment and discriminatory conduct in handbook.
- 4) Reiterate that all employees, including management, are required to abide by the policies.
- 5) State that violations of the policy will result in disciplinary action, up to and including termination.
- 6) Explicitly set forth a grievance procedure that provides the employee with options for reporting harassment to the company, including gender and/or seniority options in the reporting chain to ensure the employee feels comfortable voicing his or her concerns.
- 7) Advise employees that their complaint will remain as confidential as possible, and that there will no retaliation taken against them for filing “good faith” complaints. Conversely, advise employees who file complaints in “bad faith,” i.e. to harass or damage other employees, of possible discipline up to and including termination.

on gender or ethnicity. While such policies may seem redundant, the protections they can afford employers from harassment lawsuits far outweighs any costs to the employer.

An effective anti-harassment policy will specifically define what is harassing conduct, as the public often misunderstands the term. Sexual harassment is the most widely recognized form of harassment, and often serves as a basis for examples of what is harassing behavior. However, if specific examples are given, the employer should also include a caveat extending the policy to those other classifications specifically protected by federal and state anti-discrimination laws. Like the anti-discrimination policy, the anti-harassment policy should likewise advise employees that the company has created a delineated grievance procedure for them to raise concerns, and encourage employees to bring concerns to the attention of management without fear of reprisal for a good faith complaint.

Vacation and Sick Leave Policies

It is important to include a section in the handbook that describes to employees the employer's time-off policies. It will be referred to often, as both employees and management will be required to consult it when resolving issues surrounding an employee's entitlement to vacation time, paid time off, and protected leaves of absence.

Because of its importance, employers should take extra care to ensure that they have prepared a policy that is in compliance with *all* applicable federal and state laws. Again, the best resource for an employer to consult when drafting such policies is a legal professional experienced in employment law. However, there are several hallmarks that should be included in any time-off policy. It should:

- 1) clearly state which employees are eligible;
- 2) identify when employees are eligible;
- 3) explain whether such benefits are paid, and if so, for what period of time;
- 4) describe the maximum length of any permitted time-off;
- 5) clarify how the company handles unused time, i.e. does such time carry over to the next year or is it forfeited by the employee; and
- 6) explain the process for requesting time off to ensure that employees provide as much advance notice as possible to management.

Many employers will also be required to address issues surrounding time off for federal and/or state laws, such as the Family and Medical Leave Act (FMLA), that create specific rights to time off for medical or family reasons. For example, under the FMLA certain employers are required to provide up to 12 weeks of unpaid time off to qualifying employees to care for a sick family member. Upon return, the employer may also be required to return the employee to the same, or equal position, as when he or she left work.

Workplace Violence

Unfortunately, workplace violence is becoming an area of growing concern for employers. Not only does such violence disrupt the employer's business, it can open the employer to claims from threatened or injured employees for failure to supervise, negligent hiring, and other civil tort claims. As such, it is imperative that employers imple-

ment a written workplace violence policy that applies to *all* employees, including both management personnel and staff. Workplace violence, and the elements of a model policy for dealing with violent employees, is set forth in more detail in Chapter 4.

Workplace Privacy

In today's work environment, most employees have access to the Internet, e-mail or a computer. Although this technology allows for increased productivity and communication, it can — in certain instances — expose an employer to liability for a variety of lawsuits, such as discrimination or negligence lawsuits. In response, many employers have implemented e-mail and Internet usage policies that advise employees that their use of their work computers or the company's network system can and will be reviewed by the employer. The employer should only review an employee's computer for legitimate business purposes.

These policies present a unique set of concerns for an employer, which must balance its own interests with the privacy rights of its employees. At issue is whether an individual's right to privacy extends to the use of a company-provided computer or network. Employers thinking of implementing such a policy — or even ones who have already done so — should seek the assistance of legal counsel to ensure that their policy is in line with local or state privacy laws.

Generally, employees in the public sector have a much greater expectation of privacy than their private sector counterparts. Because of this, private employers are given greater latitude as to the types of monitoring in which they can engage and the frequency they conduct such monitoring. Several courts have even held that by implementing and disseminating a written policy to their employees, private employers can extinguish any reasonable expectation of privacy. Whether this will remain the law, or if the protections afforded public employees will be expanded to private employee, is still unclear.

Employers instituting these policies can expect some degree of resistance from employees. The idea that one's e-mail and/or Internet usage is subject to monitoring and review is upsetting to most people. However, most employers find that the potential for liability far outweighs any temporary resistance that these policies create. Also, after getting over their initial surprise, most employees will realize they already exercise the same discretion and judgment in their Internet and e-mail use that these policies are looking to foster.

Distributing and Implementing the Handbook

After selecting and drafting policies for inclusion in the handbook, the employer must then distribute the finished manual to its employees and see that its managers implement it. At first blush, these seem like relatively easy tasks. However, these considerations should be given just as much attention as the language of the policies.

Traditionally employers distributed handbooks to their employees by giving each employee a hard copy of the handbook. However, with technology playing a larger role in the employment landscape, more employers are making use of electronic media for distribution. Regardless of which method of distribution is chosen, an employer should be mindful that it only distributes the handbook only to *actual* employees, and not to outsiders.

Distributing the Handbook

Regardless of which method is chosen, employers should look to obtain a receipt and acknowledgment form from each employee stating that he or she has received a copy

of the handbook, and has read and understood the policies and procedures therein. This form should also include language stating that the employee understands he or she is subject to the guidelines in the handbook and that he or she understands that the handbook is not a contract for employment. If an employee refuses to sign an acknowledgment form, the employer should sign and date the acknowledgment form, with a note indicating that the employee was given a copy of the handbook and that he or she was advised that the policies therein would govern their employment and reminded that he or she was an employee “at-will.” The employer should retain all acknowledgment forms, whether completed by the employee or the employer.

Once the handbooks have been distributed, and the acknowledgment forms collected and filed, the employer must ensure that its managers apply the policies in an even and consistent manner. Perhaps the best way to ensure this is through routine programs for management personnel to review the handbook and methods for resolving conflicts and issues that arise in the workplace. Managers should also be encouraged to seek the assistance of their superiors or the HR department to resolve questions on which the handbook is unclear or silent. In this way, upper management can ensure that all managers apply the same standards throughout the company, and also identify areas that need additional attention in the handbook.

Revising the Handbook

The final caveat to any discussion of employee handbooks — and one that is often overlooked by many employers — is that if the handbook is to remain an effective tool against litigation, the employer must periodically review and revise it. Like any infrastructure, handbooks are a dynamic concept and should grow with the employer. Employers should be mindful of how their employees react to specific portions of the handbook, whether the procedures created by the handbook are effective in resolving employee concerns and whether there are areas that are not covered by the handbook. Additionally, employers should periodically consult with a legal professional to determine whether the handbook remains consistent with applicable federal and/or state law.

With this caveat in mind, the handbook should be drafted in such a way as to notify employees that the employer has the right to modify, supplement, or rescind the handbook policies at any time and without any notice. This notice will also serve as a reminder to the employee that the handbook in no way creates an employment contract — either as to the duration of employment or the terms/conditions of employment. However, when revising the handbook, the best practice is for an employer to provide reasonable notice to employees. This not only ensures that the handbook will continue to be viewed as an impartial document; it will also help to eliminate employee distrust or apprehension about the revisions.

Action Steps

At-will Disclaimers

- 1) Clearly state that the handbook is not a contract, nor does it contain any promises for “permanent” or continued employment.
- 2) Place this statement in a prominent position at the front of the handbook, distinguished from the remainder of the page by a border, bold type or different size or style of font.
- 3) State that the employer remains free to unilaterally change, modify or otherwise revise the handbook at any time without prior consultation or agreement from the employees.

