



## Employment Law Update

### EMPLOYEE HANDBOOKS

Employers considering a handbook for the first time, or who have not revised their existing handbook in several years should take into account the following.

#### **To Have or Have Not**

No law requires a handbook. However an employer with a handbook will usually be in a better position to prevent or defend an employment lawsuit.

There was a time when many management lawyers recommended the use of employee handbooks primarily to thwart union organizing efforts by giving the appearance of a contract especially for their non-union clients. Times have changed, and so have the minds of most management lawyers. The biggest threat to a company today is not a union, but a single employee filing a lawsuit, or worse yet a class action. Contrary to past practice a handbook must never appear to be a contract of employment. Compliance with federal laws requires notifying employees that the company supports equal opportunity, prohibits harassment, and allows time off for certain reasons. There are even more requirements under California law. Notification of the company's position on these and other issues can best be communicated through a well-written handbook that preserves the employer's flexibility but does not create a contract with employees. In short, in most cases an employer should have a handbook. There is one situation where a handbook can do more harm than good. That is where to employer decides that it cannot abide by the terms and conditions in the handbook but instead prefers to treat each employee individually. Although a poor decision from a legal perspective, some employers make this choice. In such a situation any employee can claim discrimination because potentially none are treated the same.

#### **The Contents**

If an employer decides to have a handbook there is no formula for what should be included in every handbook. It's up to the employer, depending on its business, the number of employees, and what the practices have been in the past.

There are a wide variety of subjects normally covered in an employee handbook including, but certainly not limited to:

- A brief history of the company, and a welcome to the new employee
- A Mission Statement
- An equal employment opportunity and nondiscrimination statement
- A policy on absenteeism
- Safety rules
- A statement that all employment remains "at will"
- Complaint handling procedures

- An overview of benefits like holidays, vacations, health, life, dental, and/or other insurance, 401(k) plans or other retirement plans
- Leave of absence policies, such as sick leave, Family and Medical Leave Act (FMLA) leave, bereavement leave, personal leave, military leave, and jury duty leave (and, remember, the law requires you to have an FMLA policy in your handbook if you have a handbook)
- E-mail, voice mail, telephone and computer policies (including Internet use)
- A statement concerning the company's monitoring (electronically or otherwise) employees while they are at work
- Harassment policy
- Smoking, dress code and customer relations policies
- A statement that the handbook is not a contract
- Policy in drugs in the workplace
- Policy on searches, of lockers, file cabinets or desks
- Policies that may be required by state law
- Acknowledgment of receipt

With the exception of a few provisions required by law, what is included is up to the employer. With respect to some of the items listed above and others consideration of laws in states where the employer does business should be considered to conform that the policies are consistent with all laws or that exceptions are noted.

### **Periodic Review**

Once a handbook has been prepared there should be a legal review of its contents to make sure that all laws (federal, state, and local) have been taken into account. Then, there should be periodic reviews to make sure that everything is still as it should be.

Also, the employer should review the handbook on an annual basis to make sure that it is still factually correct. Policies change, and updates should be made as changes occur. A factually inaccurate handbook, or one that is not representative of actual practices, can be as problematic as statements that are illegal.

### **Provisions to Avoid**

There are a few handbook provisions that may create legal risks.

Language concerning long-term employment, permanent employment, uninterrupted employment, continued employment as long as a job is done satisfactorily, and the like should be avoided. This kind of language has been held by courts to imply something more than an indefinite or at-will employment situation. In other words, it could create a guarantee of employment.

The term “probationary” periods of employment should not be used. This term could imply that once employees complete this period, they are entitled to a more definite period of employment. Rather than calling the first 30, 60, or 90 days of employment the “probationary period,” the preferred term is “introductory period” during which an employee learns about the job and receives closer supervision, and during which all benefits of regular or full time employment may not be available.

Statements that employees will be terminated or discharged only “for cause” should be avoided. While an employee is rarely terminated for no reason at all, the use of terms such as “cause,” “good cause,” or “just cause” have special significance in the law and may mean that an employee cannot be terminated except for serious misconduct. However, the first line of defense to any charge that a termination, or other adverse employment decision, was for an unlawful discriminatory reason is that there was a legitimate non-discriminatory business reason, in other words, cause.

## Procedures and Promises

Pay close attention to language concerning procedures specified in a handbook, especially that relate to complaints, discipline, terminations, promotions, layoffs, salary increases, job relocation, and severance pay. All procedures concerning these subjects should be carefully worded. Think through what the procedures require, anticipate potential problems, and make changes in the problem areas. If a procedure exists, it needs to be followed since the failure to do so will give an employee a basis for claiming discrimination, i.e., the policy was not followed in his or her case because of his or her protected status. Adherence to the procedure will go a long way toward heading off such a claim or lawsuit.

If a progressive discipline system is included in an employee handbook it should be clear that it is not mandatory. If certain things must be done before a discharge (for example, the employee will be given an oral or written warning), the result may be a claim of violating the contract created by this procedure if you terminate an employee before going through all steps of the progressive discipline system. Policies of this type are fertile ground for wrongful discharge claims. General statements concerning progressive discipline are a good idea. If too much emphasis is placed on the at-will nature of the employment relationship it can have a detrimental effect on employee loyalty.

If a progressive discipline policy is included in a handbook, make sure the employees know these are guidelines only, and include a provision making it clear that at the employer's discretion all steps can be skipped or the progressive discipline system may not be used at all when an employee is discharged.

## Procedural Issues

When employees are given a handbook, they should sign a statement acknowledging its receipt, and that receipt should be maintained in their personnel file.

Similarly, employees should sign a statement acknowledging receipt of any changes in the handbook during the course of employment.

Finally, clearly state in the handbook that it is not a contract -- that it is, rather, a set of general guidelines and procedures to assist the employee in performing his or her job, and that you reserve the right to change or delete those guidelines, policies, and procedures.

**Ezra, Brutzkus, Gubner LLP** offers its clients advice and counsel in all areas of labor and employment law. **Richard L. Mann** has 30 years of experience representing employers around the nation in all aspects of labor and employment law including discrimination, wrongful termination and wage-hour disputes and traditional labor relations. Mr. Mann has represented employers in a variety of industries including apparel, hospitality, manufacturing,

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