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EMPLOYEE HANDBOOKS AND POLICIES

§1 Introduction

Employees are obviously essential to any business and companies typically try and lay out the rules of their relationship with their employees through handbooks and policies. When creating and administering employee handbooks and policies it is important to understand the relevant legal considerations, strategies for formatting and contents, equal opportunity policies, pay and benefits policies, methods for laying out standards of conduct, time off and leave policies, “on the job” policies, safety and health policies and Internet use and social networking policies. In order for employee handbooks and policies to be effective, the drafter must have a good working knowledge of the fundamental legal principles associated with the employer-employee relationship and law and practice in specific areas such as recruitment and hiring, discipline and termination, and discrimination and harassment. In addition, it is not sufficient to write and distribute handbooks and policies; the contents of those documents must have practical and “real world” meaning in the workplace and should be followed by executives, managers and other supervisors. Plans should always be made to educate and train anyone in a supervisory role about their responsibilities under employee handbooks and policies.

§2 Legal considerations

While employee handbooks and policies can, and often do, relate to issues other than laws and regulations, such as organizational culture and communications among employees, most of the documents are indeed written to support compliance with equal employment opportunity laws, laws and cases pertaining to sexual harassment, the Americans with Disabilities Act, the Occupational Safety and Health Act, wage and hour laws, the National Labor Relations Act and recordkeeping requirements. Other legal issues of concern in the workplace context include prevention of workplace violence, protecting the principle of “at will” employment and workplace privacy and confidentiality. All of the information in employee handbooks and policies must conform to the law and be presented in a way that satisfies any specific legal requirements as to form and/or manner of distribution. Reference should be made to the language included in statutes regarding the contents of notices that must be provided to employees regarding various aspects of the employment relationship and a review of relevant cases should also be made since judges are often asked to comment on the sufficiency of employer policies and procedures when deciding employment-related claims.

§3 Formatting

Employment-related policies and procedures can be compiled and distributed in a number of different ways. For example, once a company reaches a certain size, such as at least 20 employees, it is common to find that a formal personnel handbook is made available in both paper and electronic formats. Alternatively, the company may simply collect the most important procedures and put them in the form of a memorandum or hand-out that is delivered to employees at the time that they join the company and then periodically thereafter. A short-form document might also be posted on the company's internal intranet for easy viewing and revision.

When it comes to actually drafting an employee handbook, it is important to keep in mind that a long handbook that goes unread doesn't have much value. Make it only as long as necessary to accomplish its purpose. Also, write it in clear, everyday English, or whatever language is appropriate for the workforce. Stay away from legalese whenever possible, even when drafting policies on matters regulated by law. Companies often have their human resources professionals prepare the initial draft of the handbook and then pass it to their lawyer for "final review". This is fine since it increases the likelihood that the content will be written in a voice that is appropriate for the particular company and its unique organizational culture; however, the attorney also needs to make sure that the client's draft covers all the important legal points applicable to the company's operational activities and that any statements of "the law" are current and correct.

§4 Contents

There are no hard and fast rules regarding the subjects that companies must cover in their employee handbooks and/or employment-related policies and procedures; however, it is generally best to be sure that each of the following topics have been addressed.

- Disclaimer of guarantee of employment and statement of "at will" employment status;
- Equal employment opportunity statement and specific policies for each of the key federal laws creating protected classes of employees;
- Policies and procedures regarding "time off" (i.e., lunch hour and other breaks, holidays, personal days, vacation policy and pay, leaves (e.g., personal, family, bereavement, educational, military service and reemployment rights), jury duty and election time off)
- Policies and procedures regarding "job-related issues" (i.e., performance evaluations, discipline and termination and other general employment practices);
- Rules and standards of workplace conduct (e.g., attendance and punctuality, protection of confidential information, visitor rules and access to premises, personal appearance and dress, smoking, gifts and gratuities, insubordination, harassment and substance abuse);
- Policies and procedures regarding compensation (i.e., pay computation, payday dates, pay deductions, bonuses, overtime pay, meal allowances, direct deposit and check cashing) and benefits (e.g., insurance, pension and tuition reimbursement benefits, including eligibility requirements);

- Policies and procedures regarding safety and health (i.e., reporting accidents, rules concerning accidents and physical examinations); and
- Policies regarding use of technology (i.e., Internet use and e-communications).

Special requirements may apply to certain types of companies, such as “whistleblower” and business ethics policies for public companies. In addition, companies engaged in international business activities need to be sure policies are in place covering export controls and compliance with domestic and foreign anti-bribery laws.

It is also recommended that companies supplement the “legal information” in their employee handbooks with a “welcome message” from the company’s chief executive officer or president, which often includes a brief summary of the company’s history and a description of the company’s mission and purpose; information about various aspects of the company’s operational activities (e.g., functions, product line, organization (possibly including a flow chart), size and background); a description of the purpose of the employee handbook and the company’s employee relations philosophy; and a list of supplemental publications available from the company or public sources such as the state employee relations office on various topics covered in the handbook or otherwise relevant to the employment relationship.

Since each new employee should be given a copy of the employee handbook upon commencement of employment, the handbook should also include a “first-day checklist” with entries for the employee’s work address, phone number, department, job title, supervisor’s name, starting pay, pay periods, and shifts. Special information for new employees might also cover employee qualifications, equal employment opportunity policy, union affiliation, hiring of employee’s relatives, probationary period (if any), part-time and temporary employees, working hours, procedures for maintaining time records and flextime. If the company has a formal orientation program for new employees, a general overview of the topics to be covered in the program should be provided along with a summary of the format of the program (e.g., how long the program will be, how topics will be presented and who will typically be involved in making the presentations). A specific schedule for each new employee’s orientation should be given to the new employee when he or she arrives for the first day of work.

The handbook should include a description of various internal communication channels available to employees such as bulletin boards, booklets, annual reports, newspapers and magazines, memos or bulletins, audiovisual media, meetings and conferences and letters. The handbook should also include formal procedures and rules for communications between employees and supervisors and discuss any formal processes that have been established for employees to bring grievances to the attention of the management personnel.

Some companies elect to create a separate section in their employee handbooks that focuses on various aspects of career development for their employees. Such a section would cover topics such as wages and salaries, job evaluation and pay structure, merit and length-of-service pay increases, incentive plans, differentials, employee and supervisory

training, promotions, transfers, career counseling and company assistance for participation in external education and training programs. Emphasis on career development is obviously a strong recruiting and retention strategy; however, as with many areas of the employee handbook it is important to be sure that employees understand that there is no guarantee of permanent employment regardless of the level of investment that the company makes in the skills of its employees.

Finally, the employee handbook should specify the effective date for the handbook and include a formal disclaimer of the handbook being a contract of employment and an acknowledgement, which should be confirmed in writing separately by the employee, of “at-will” status and the management’s right to alter provisions in the handbook and related policies.

While the human resources department may take the lead in preparing policies and procedures, the legal department or outside counsel may get asked to provide input on contents. If so, there are a few basic steps that counsel should take. First, the attorney should gather all existing memoranda and other written policies on the terms and conditions of employment and also determine whether there are any “unwritten” policies or procedures that are commonly understood and followed among the workforce. Second, the attorney needs to know how many employees there are, as well as where the company is operating, in order to determine which laws apply to the company. Third, the attorney should meet with the company’s managers, including human resources, payroll, and benefits administration, to discuss the need for any new policies or the potential need for policies in the future. Finally, the attorney should review all existing policies for compliance and to make recommendations for changes and prepare a list of those subjects that the attorney thinks should be covered by new policies.

When reviewing an existing policy, or preparing a new one, reference should be made to examples from other companies that are known to be well represented on labor and employment matters. However, simply copying what other companies have done should be avoided since it is generally difficult to tell how current their language is or whether the language was drafted to take into account circumstances specific to the other company.

§5 Standard employment policies

The employee handbook should incorporate all of the company employment policies and procedures, either by setting the policy out in its entirety in the handbook or including a summary of the policy in the handbook with information on how to access the entire policy. Each company is different and the range of policies will depend upon various factors such as the company’s size and business activities; however, the following list is illustrative of the “standard” employment policies and procedures that should always be considered:

Probationary period. Many employees hire new employees on a “probationary” basis with the understanding on both sides that continuation of employment will depend on satisfactory completion of a “probationary period”, which typically runs from 30 to 90

days, during which the candidate will be evaluated by his or her supervisor. The details of any probationary hiring program should be laid out in a formal policy statement. It should be noted, however, that some employers do not follow this practice due to concerns that the employee (or a court) may draw the inference that continued employment beyond that period is permanent, rather than at-will. In a probationary period is used, the policy should make it clear that once the period is ended the relationship becomes “regular”, rather than “permanent”, employment.

Hours of work and overtime policy. Companies should set the expected hours of work and the specific policies and procedures relating to overtime work and pay. The policies should discuss the legal requirements for overtime pay and the conditions that must be satisfied before an employee can assert a claim for overtime pay (e.g., formal request to supervisors before engaging in any work activities outside of standard hours of work).

Wage and performance reviews. Policies and procedures should be created regarding wages and performance reviews so that employees have a clear understanding of how and when they will be reviewed and how the results of the review will be reported and used in setting compensation. Such a policy can be a useful tool for minimizing the risk of lawsuits based on discrimination; however, it is important that managers and supervisors follow the policies and that actual compensation decisions reflect adherence to the policy.

Family and medical leave policies. Employers should have family and medical leave policies that explain, and conform to, the requirements of both federal and state laws. Among other things, the policies should include instructions that employees should follow in order to claim their benefits and request time off. The policies should address all of the different situations that trigger legal rights and obligations and should define and describe key terms such as “serious illness” and “family member”.

Leaves of absence. In addition to family and medical leaves, employees should have policies and procedures covering other leaves of absence (“LOAs”) for various reasons such as personal (e.g., illness, bereavement etc.), disability and military. The policies should include the procedures to be followed for requesting an LOA, the requirements for approval of any LOA and the time limits imposed on any LOA. In general, employers should require that all LOA requests and approvals be made in writing to the extent practicable.

Absence reporting requirements. Policies regarding absence reporting should require employees to provide an acceptable explanation of any absence of work that has not been previously approved by the employee’s supervisor and the policy should also provide that after a specified number of days of absence without acceptable explanation an employee will be deemed to have voluntarily resigned.

Personnel records. Employees should be informed of the contents of the personnel records file and their rights with respect to inspecting those records. In addition, employees should be reminded that they are obligated to notify their supervisor or the HR director of any change in name, address, telephone number, or person to notify in case of

accident or illness.

Workplace safety policies. Employers should develop and publish policies and procedures relating to workplace safety, particularly in those situations where employers are engaged in activities that are covered by the federal Occupational Safety and Health Act (“OSHA”).

Workplace conduct. An employee handbook is a good opportunity for employers to set out their expectations of employees with respect to their conduct while at the workplace or otherwise representing the company. Conduct rules and standards are intended to create an environment in which all employees treat one another with respect and are importance foundation for the company’s overall organizational culture. Topics and activities that might be covered include attendance and punctuality, protection of confidential information, visitor rules, access to premises, smoking, disciplinary procedures, garnishment, moonlighting, off-the-job conduct, personal appearance and dress, gifts and gratuities, customer service, insubordination, harassment and substance abuse.

Progressive discipline policies. Many employers implement a “progressive discipline” system allows employees to measure the seriousness of any warnings received and creates a record of improper conduct for the employer. Details of any such system should be carefully explained and it is important for employers to make it clear that the system may or may not be used in case where the problem is a result of either poor performance or misconduct of the employee (i.e., an employee found to have engaged in gross misconduct will be subject to immediate termination regardless of whether all the steps in the progressive procedure have been completed).

At-will employment and termination events. Employee handbooks should include a separate section, prominently placed, that makes it clear to employees that their employment is at-will and that they may be terminated with or without cause and with or without notice. Some employers include examples of prohibited activities that will result in immediate dismissal in their employee handbooks; however, if this is done language should be inserted that makes it clear that the examples are not intended to be a complete list of all violations leading to discharge. Various issues and procedures relating to termination of employment, regardless of the reason for termination, should also be covered such as layoffs, discharge, resignation, severance pay, exit interviews and outplacement.

Benefits policies and procedures. Common policies and procedure relating to benefits generally cover paid time off (i.e., holidays and vacations), profit sharing and pension plans, insurance coverage (e.g., health, life, disability, accident and sickness, dental and vision care), educational assistance (i.e., scholarships and tuition aid), savings plans, stock option plans, child care, pre-retirement planning, employee loans, employee discounts, credit union, moving and relocation expenses, recreation programs, food services, employee assistance programs, use of company vehicles, employment referral bonuses and education and training programs. A list of company holidays and a description of eligibility criteria for holiday pay should be included and policies regarding vacations

should cover years of service requirements for accrual of paid vacation and company rules regarding carryover of accrued vacation days from year-to-year.

§6 Equal employment opportunity policies

One of the most common, and important, purposes of an employee handbook is to lay out the company's duties and responsibilities with respect to compliance with federal and state equal opportunity laws and regulations, which apply across a wide range of employment-related activities including recruitment and hiring, discrimination and harassment and discipline and termination. Every company should have policies that deal with providing equal employment opportunities to persons within protected classes. In addition, companies generally have a separate policies regarding employees with disabilities and compliance with the Americans with Disabilities Act and policies prohibiting harassment/discrimination and establishing procedures for reporting and investigating claims of harassment or discrimination.

§7 Pay and benefits policies

Companies should clearly and carefully explain their policies regarding pay and benefits. One area where companies need to exercise caution is with respect to minimum wage and overtime pay. Several approaches can be taken in this regard. For example, many companies adopt policies that provide that overtime will only be assigned if supervisors are able to provide reasonable advance notice to effected employees. Companies may also provide information regarding the procedures to be followed when determining which employees will work during overtime periods. Details on this issue are important to allow employees to understand the circumstances under which they may be required to work overtime, as well as the factors that will be considered when employees are vying for the right to earn extra overtime pay. In all cases, the policy should recite when overtime pay will be required as a matter of law and the extra amounts that will be paid to employees during overtime periods.

§8 Standards of conduct

Many companies compile and publish a list of guidelines for employees with respect to certain activities and types of conduct typically found in the workplace including attendance and punctuality; personal appearance; drug- and smoke-free workplace; substance abuse; gifts, conflicts of interest and other ethical matters; protection of confidential information; and solicitations and distribution of literature. Some of these areas might be covered in detail in other policies. For example, protection of confidential information is obviously the primary objective of a trade secret protection program and such a program generally includes one or more policies regarding disclosure of trade secrets to third parties, physical security measures and the use of written non-disclosure agreements.

§9 Time off and leave policies

Policies regarding “time off” and leaves, including holidays and vacations and leaves of absence for specified reasons, should be carefully drafted to conform to applicable laws and regulations. For example, the federal Family and Medical Leave Act, or “FMLA”, requires covered employers to provide eligible individuals with up to 12 workweeks of unpaid leave per year for the birth, adoption, or foster care placement of a child; or serious health conditions of employees or their children, spouse, or parents. In addition, the FMLA includes two military family leave entitlements—the military caregiver leave and the qualifying exigency leave. Covered employers must give information to employees about their rights under the FMLA, post various notices including prescribed information and include information about the FMLA in their personnel handbook.

§10 “On the job” policies

Certain topics do not fit easily into any other categories; however, they do represent important elements of an employee’s “on the job” experience. For example, the human resource department may promulgate a brief description of the steps that will be taken to complete regular performance evaluations for employees and will also create standardized forms for collecting information and assessing performance. Corrective actions are part of a company’s discipline policies and procedures. Policies on creation and destruction of personnel records, including the contents of those records, should be developed as part of the company’s overall records retention policy. Finally, many companies unknowingly drift into an unwritten pattern of payment practices to terminated employees and the better approach is to develop and publish a clear set of guidelines with respect to severance pay.

§11 Safety and health policies

Workplace safety is a major concern for all companies, not only because of potential legal liability but also because of the disruption caused by the inability of trained and skilled workers to be available to do their jobs. The policies in this area begin at the time that a new employee is hired and companies must carefully consider the circumstances under which medical examinations will be required as a condition of employment. During the term of employment attention turns to making sure employees are trained to act safely and that procedures are in place for quickly responding to accidents involving employees and/or visitors to the workplace. Finally, workplace violence is, unfortunately, a not uncommon experience and companies need to have procedures in place to screen for potential problems with new employees and monitor situations in the workplace that might escalate to the point where someone is in danger.

§12 Internet use and social networking policies

Internet technology has transformed the workplace and the same can be said for social networking. While the Internet has created significant benefits, it also carries the potential for extraordinary liability and businesses can find themselves in trouble for infringement of

intellectual property rights, unfair competition, defamation, sexual harassment, wrongful termination, fraud and invasion of privacy. In addition, connecting its computer system to the Internet, or allowing dial-in access, can expose a company to computer hackers, viruses, and industrial espionage. As for social networking, companies must not only deal with distracted employees they must also take steps to fend off potential liability for defamation, harassment or discrimination, deceptive or unfair trade practices and unauthorized release of privileged and/or confidential information.

It is imperative for your clients to adopt and enforce Internet use and social networking policies that cover compliance with intellectual property laws; scope of authorized use of company Internet, e-mail and social networking tools; prohibition of specific types of Internet use and content; compliance with procedures established for privileged communications and litigation; installation of unauthorized software, including encryption software; employee privacy and protections against unauthorized access; format and content of e-communications; retention of e-communications; and behavior as social networking participant. Companies can use a variety of strategies in drafting appropriate policies. As the company begins to integrate the new technologies into the workplace, it might adopt a simple and basic policy regarding computer use. If liabilities arising from Internet access are a concern, the policy might focus on the specific risks associated with the Web. When the company is small and activities are somewhat informal the policy can be relatively short and focus on general “common sense” guidelines. As the company grows, however, the policy should be more comprehensive and include issues such as infringement and obscene materials. Many firms adopt a more comprehensive policy covering all aspects of the business-related uses of the Internet as well as the company's in-house computers and networks.

§13 Disclaimers, reservations of rights and cautions

Employee handbooks should also include separate sections that conspicuously set out various disclaimers and specific reserve certain rights to the company management. The most common disclaimer relates to “at will” employment. If it is intended that employment with the company be “at-will”, the handbook must say so in unequivocal and prominent language that also makes it clear that the employer reserves the right to terminate employees at any time and for any reason or for no reason at all, with or without notice. If a company's operations are covered by a collective bargaining agreement, its handbook can contain work rules that are permissible under a “management rights” clause. This clause entitles the employer to all functions of management that are not specifically limited by the agreement.

A disclaimer statement in the employee handbook is an absolute necessity to protect the rights of employers. Employee handbooks are essentially a set of rules that employees are expected to follow and procedures the employer will follow in disciplining employees who break the rules. The concern from a legal perspective is that these listings of rules and procedures can create an expectation that employees will not be fired if they do not break the rules. In order to rebut these expectations, disclaimers must be included in the handbook to allow employers to deviate from the procedures and terminate employees

when the circumstances warrant even if all of the steps outlined in the handbook have not been completed..

In order for a disclaimer to be effective and upheld by the courts it must be clear and unambiguous and conspicuous. In order ensure that a disclaimer will be found to be “clear and unambiguous”, the drafters of the handbook should remove legal jargon; avoid inconsistencies in what the disclaimer says and what the rest of the handbook says; and make sure the headings and context clearly describe, rather than obscure or minimize, what the disclaimer is. One common problem to avoid is stating that the employer *will* follow certain disciplinary procedures while the disclaimer says the employer *may or may not* follow the disciplinary procedures before termination. The proper approach is to state that the employer *may* follow the procedures but that the employer reserves the right to terminate employees at any time and for any reason.

As for making a disclaimer “conspicuous”, the key is to make sure that it is presented in a manner that calls attention to it and which cannot reasonably be ignored by employees or courts deciding whether or not it should have been clear to employees. Disclaimers should not be buried in other text and the preferred approach is to use a separate page for the disclaimer, or put a border around it to set it off from other text on the page; put a bold, capitalized heading at the top of the disclaimer; and put the disclaimer in type that is as big or bigger than other text in the handbook. In addition, the disclaimer page should include a space for the employee to acknowledge that he or she has received the handbook and read the disclosure and that he or she understands that the handbook does not create any contractual right to employment or to any particular terms and conditions of employment.

§14 Changing employee handbooks and policies

In general, employers may change their employee handbooks and policies to suit the evolving needs of their business and, of course, changes should always be made to take into account new developments with respect to applicable laws and regulations. In fact, it is important for the employer to explicitly reserve the right to make changes in its handbook and in each of the individual employment policies. Once a decision is made to change the employee handbook or an employee policy, employers should make sure the changes are legal; prepare the new policy in writing and add it to the handbook; announce the new policy and distribute a new handbook and summary of its terms to all employees; distribute a statement that says by choosing to remain employed, employees are deemed to have agreed to the new policy; have employees sign an acknowledgement that they received the new handbook, summary and statement and that they have read the new policy provisions, understand them and agree to follow them; and, if necessary, ensure that employees’ religious beliefs and disabilities are accommodated with respect to the implementation of the new policy.

The best course of action for ensuring that employees will be bound by the changes is to have them agree to the changes in writing; however, if that is not possible, or there are concerns that employees may balk at voluntarily signing an agreement, the changes should be carried out using the aforementioned steps. Employees should be advised though that

absent a formal agreement, employees may not be forced to comply with certain restrictive rules, such as arbitration policies that are held to be invalid on the grounds that they are unfair to employees. If employees do not sign the acknowledgement referred to above, a reminder note should be sent. If an employee is still unwilling to sign, a final notice should be sent saying that the policy will become effective on a specific date and that employees who continue to work after that date will be considered to have accepted the policy. A copy of the reminder note and final notice should be placed in the employee's personnel file.

As noted above, before adopting a new policy employers must be sure that it will be "legal", which means it does not violate a contract, discriminate against protected individuals, violate any law (i.e., the policy must meet or exceed the minimum legal requirements that apply to the organization, such as requirements relating to mandatory leaves, overtime etc.), or cause employees to lose benefits (e.g., floating holidays, vacation days, bonuses or commissions) that they have already earned. As for contracts, consideration must be given to any employment contracts that have been entered into with various employees that promise them specific benefits for a specific period of time. In that situation, employers may not take any action that adversely impacts the promised benefits unless the employer has reserved the right to change benefits or modify the contract's terms, the employee agrees to the change or the contract expires.

Once the employer has determined that the proposed new policy is legal, it should be set out in writing, a process that will force the employer to think through any potential implementation problems and allow for review by appropriate personnel, including legal advisors. Once the wording has been finalized, the policy should be added to the employee handbook and the revised handbook should be distributed to all employees at the same time that an announcement of the change is made. If a new policy may be difficult to understand, it makes sense to prepare and distribute a statement to employees that summarizes the key provisions of the policy; however, the summary should make it clear that the policy, not the summary, will apply to employees. In addition, if possible, the new policy and updated handbook should be distributed to before the policy takes effect, thereby creating a window of time to train supervisors and give employees an opportunity to read the policy and ask for clarifications. An accurate record should be created and maintained of the dates that new handbooks are distributed and the names of all employees who received them.

Careful attention to the above-described procedures when make changes to the employee handbook to avoid claims for wrongful discharge based on the argument that the changes were not binding on the terminated employee and that his or her employment relationship was actually governed by an earlier version. Case law relating to the effectiveness of changes to employee handbooks demands that revisions must be clear and plain, meaning that the nature, significance and consequences of the changes must be spelled out simply enough that employees can understand the changes; that the changes must be communicated to the workforce, preferably using the same procedures followed for introducing the handbook in the first place and culminating in the explicit written acknowledgement of the changes by employees; and that there must be adequate

consideration for the modification, which can be something as simple as continuing to work under the revised handbook or something more substantial such as a raise or promotion. Particular caution should be used by employers when the changes impact procedures relating to discipline and/or termination, such as modifying the rules to convert from a just cause or progressive discipline procedure to an at-will scheme. In addition, courts in some states will balk at the sufficiency of mere continued employment and an acknowledgment of the changes as being sufficient consideration and in those instances it is important for the employer to demonstrate that employees have received some additional benefit beyond job retention. While the intent may be to make changes to one particular section of the handbook it is important to review the entire handbook for consistency to avoid contradictions (e.g., declarations of “at-will” employment in one section along with promises of maximum job security or a multi-step disciplinary procedure in another section).