Handbook Hot Topics: Back To Basics After Admin Change

By **Kasey Cappellano and Meaghan Gandy** (March 3, 2025)

This article is part of a bimonthly column that discusses trending employee handbook issues. In this installment, we focus on the key considerations in drafting or updating an employee handbook, including what to add and why, and common traps for the unwary.

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For employers, an up-to-date employee handbook that operates in strict compliance with current law is more critical than ever, given the change in administration and the increase in state-level employment laws.

Within days of taking office, the new administration issued executive orders that may affect employee handbooks.

For example, federal contractors will be directly affected by the revocation of previous executive orders on affirmative action. Additionally, all private sector employers should scrutinize their handbook policies to ensure they cannot be read to encourage preferences for employees based on race, gender or religion.

Even without the likelihood of additional changes affecting employers during the next four years, most employers would benefit from a better understanding of the benefits and risks of an employee handbook. And the first quarter of the year can be an ideal time to conduct a review and address any potential issues.

Employers may think a handbook's purpose is to provide workers with guidance on important workplace rules and information on benefits. While this is true, a handbook also can be a powerful tool to limit the employer's liability by demonstrating compliance with the law and establishing certain affirmative defenses.

However, an outdated or poorly drafted handbook can also carry risks, and in some cases, could be worse than having no handbook at all. This article will discuss the key considerations in drafting or updating an employee handbook, including what to add and why, and common traps for the unwary.

Limiting Liability

Key handbook policies for limiting an employer's liability include antidiscrimination, antiretaliation and anti-harassment policies, as well as disability, pregnancy and religious accommodation policies.

These policies should be carefully drafted to demonstrate that the employer is aware of the protected categories and rights under the law, to give employees information about how to assert their rights or make a complaint, and to identify people who are responsible for answering questions or assisting employees in asserting these rights.

Providing multiple reporting or complaint options is vitally important to ensure that all employees have at least one person with whom they feel comfortable discussing their

concern.

Notifying employees of the employer's commitment to preventing discrimination, harassment and retaliation, and ensuring employees are aware of reporting avenues, also are necessary steps to establish the Faragher-Ellerth[1] affirmative defense, derived from the U.S. Supreme Court's 1998 rulings in Faragher v. City of Boca Raton and Burlington Industries Inc. v. Ellerth.

If established, this affirmative defense may be used in many cases to prevent an employee from succeeding on a hostile work environment claim if the employee did not take advantage of the employer's reporting procedure, and can afford the employer a chance to remedy the problem.

In other words, providing and carefully following these policies could allow an employer to take early action on a complaint and entirely avoid liability, even if some wrongful conduct has occurred.

Similarly, employers may be able to avoid penalties under the Fair Labor Standards Act by establishing and providing notice of a safe harbor policy prohibiting improper deductions, including a complaint procedure, which should be in the employee handbook.

Again, this means that even if an improper deduction has occurred, an employer may be able to avoid liability by promptly reimbursing the employee after receiving a complaint, and by making a good faith commitment to comply with the law in the future.

Finally, it is imperative to include policies notifying employees of their rights under certain laws that mandate the information be provided.

For instance, an employer covered by the Family and Medical Leave Act is obligated to provide specific information about the law, in either its handbook or a separately distributed document.

Employers must also provide notice regarding the Uniformed Services Employment and Reemployment Rights Act, the Pregnant Workers Fairness Act, and many other federal laws, by poster, in a handbook or both.

Likewise, many states have laws, especially leave laws, that require employers to specifically notify employees of the available benefits.

Failure to provide this notice could constitute interference with the employees' rights or, at a minimum, could be considered evidence of the employer's ignorance of the law.

Retaining Employer Rights

By providing appropriate notice in handbooks, employers may retain rights to manage employees that might not otherwise be available.

For instance, by providing notice of an employer's right to search the workplace, including private offices, locked drawers, closets or other areas, an employer may potentially avoid claims for invasion of privacy if the need for a search arises.

The same holds true for a policy providing that, in circumstances giving rise to reasonable suspicion, an employer may require an employee to submit to a search of their person or be

subject to disciplinary action.

Similarly, an employer that wants to drug test employees regularly, or even retain the right to drug test them if necessary, must include a drug testing policy in the employee handbook.

Among other things, to avoid invasion of privacy claims, this policy should provide notice of the circumstances under which testing could be performed, e.g., upon hire, random, postaccident and reasonable suspicion, as well as complying with all applicable state law requirements.

To ensure employers can monitor any and all electronic activity, employees should be given notice that they have no right of privacy in any use of company information technology systems, or in any use of private information technology systems if used for company work.

Employees should also be notified that the company may monitor or review any access, postings or communications.

Finally, employers should include a policy that describes, in detail, which company information is confidential, and the steps employees are required to take to protect this information.

Failing to properly define valuable company information makes it much more difficult to maintain confidentiality and prosecute employees for improper use of the information.

Employers also should include a Defend Trade Secrets Act notice in their handbooks. This notice provides information about the limited instances in which employees may be able to disclose trade secret information with immunity, and it is required to permit employers to utilize the extraordinary remedies available under the act.

Handbook Traps

Out-of-date, ill-considered or poorly drafted handbook policies carry significant risks. Failure to update policies, or create new ones, after laws are passed or modified may be used to argue that the employer is not in compliance with the law, or is ignorant of it.

In addition, creating any written policy that the employer does not strictly follow allows a claimant to assert that the employer does not follow any of its policies, and therefore does not comply with employment law.

This risk is enhanced if employers operate in multiple states or have remote employees working from different states, as state laws vary significantly. If an employer does not account for differences in state law, it may unknowingly violate the law applicable to employees in a different location.

Employers may also unknowingly create liability for themselves by using language that could deter an employee from exercising their right to engage in protected concerted activity under the National Labor Relations Act — which applies to all employers, whether unionized or not.

Employers must be careful not to chill employee rights by including overly broad policies or otherwise objectionable language under the NLRA.

Further, if not drafted properly, handbook policies may create an implied contract that binds the employer to take specific actions before separating an individual from employment, notwithstanding any argument that employment is at will.

Employers are most at risk of creating implied contracts in policies discussing specific conduct that constitutes cause for termination, or progressive disciplinary policies that mandate the employer abide by specific corrective steps.

Moreover, each handbook policy should be reviewed for relevancy, accuracy, brevity and clarity, in both structure and language. If employees cannot grasp the information provided, they may credibly argue that the handbook failed to provide adequate notice of required policies or retain employer rights.

Finally, if an employer cannot prove that an employee received the handbook, they are unable to reap the benefits of a compliant handbook. Employers should obtain a signed acknowledgment, require all employees to return the acknowledgment, and maintain records relating to the acknowledgments. Employers must also obtain and retain new acknowledgments of receipt after distributing updated handbooks.

Conclusion

Creating an effective employee handbook requires critical consideration of the nature of the workforce, an employer's obligation to provide notice of employee entitlements, an employer's desire to retain particular rights, the need for flexibility around a particular topic, and any policies that are provided solely to avoid confusion or to increase employee morale.

No policy should ever be included in a handbook without considering the legal benefits, as well as the potential consequences.

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[1] See Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).