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## New Year, New Handbook

Employers should consider ringing in the 2024 New Year with revised employee handbooks. An up-to-date handbook is a helpful way to mitigate and, in some cases, prevent costly litigation. Outdated handbooks, on the other hand, run a high risk of not complying with various rules and laws, and can even be marked as “Exhibit A” in court proceedings.

For instance, in *Ferguson v. Smith*,<sup>1</sup> the U.S. District Court for the District of Oregon denied the defendant-employer’s motion for summary judgment on the plaintiff-employees’ Fair Labor Standards Act (“FLSA”)<sup>2</sup> claim because there was a genuine dispute of material fact regarding the employer’s pay policy. The employees claimed their employer failed to pay them on their “regular payday” and, therefore, violated the FLSA when their employer did not pay them in accordance with the handbook’s pay policy. The employer’s pay policy reflected in its handbook was inconsistent with its actual payment practices—and was so for many years—which was a factor the court considered when denying the employer’s motion for summary judgment.

Aside from staying abreast of their own policies, employers also should keep up with new legal precedent. For instance, recently enacted or updated state paid and unpaid leave laws may affect the total hours of leave an employee is permitted to take per year and also may expand the definition of “family member” and the qualifying reasons an employee may take leave. An employer’s existing paid or unpaid leave policies should be updated to provide notice of any additional state entitlements, to explain the interaction of company benefits with those provided by law, and to comply with any new requirements. Complying with these state and local mandates, some of which have yet to be implemented, requires detailed review of an employer’s existing leave policies and procedures.

<sup>1</sup> No. 3:18-CV-372-SB, 2021 WL 4330851, at \*4 (D. Or. Sept. 23, 2021).

<sup>2</sup> The FLSA is a federal law that provides various standards for most full- and part-time workers. Under the FLSA, an employer generally must pay covered non-exempt employees the full minimum wage and any overtime due on the regularly scheduled pay. See 29 U.S.C. §§ 206(a), 207(a)(1).

<sup>3</sup> The NLRA protects employees when engaging in certain concerted activities, such as when two or more employees act together to improve the terms and conditions of their employment. Specifically, Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as well as the right “to refrain from any or all such activities.” Under Section 8(a)(1), it is an unfair labor practice for employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the NLRA.

Likewise, and as discussed in more detail in a [prior Client Alert](#), a recent National Labor Relations Board (“NLRB”) opinion adopted a burden-shifting framework to determine whether facially neutral workplace rules, including handbook policies, violate the National Labor Relations Act (“NLRA”).<sup>3</sup> As part of this new burden-shifting method, the NLRB broadly “consider[s] all important aspects of the problem posed by potentially overbroad work rules,” such as “the specific wording of the rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe.” Employee policies, therefore, should be carefully and thoughtfully crafted.

These are just a few examples demonstrating the importance of regular review and revision of your employee handbook by an experienced employment attorney. In addition to running afoul of recently developed law (which in turn can result in expensive litigation and create legal exposure for your organization), an outdated handbook also can cause confusion among your employees.

Other noteworthy reasons to have a regularly updated handbook include:

- Preventing misunderstandings by introducing employees to the company’s background, culture and expectations.
- Demonstrating the employer’s knowledge of and compliance with applicable local, state and federal laws.
- Generating employee goodwill by showing the employer’s commitment to treating everyone fairly and equitably.
- Providing a reference guide to supervisors and managers and ensuring that policies are applied consistently.
- Mitigating against certain claims, such as breach of employment agreement or invasion of privacy.
- Supporting affirmative defenses and shielding against certain claims, including harassment or improper wage deductions.
- Creating additional safeguards via safety-related policies and procedures.
- Reducing the risk of information theft and unfair competition.
- Educating the decisionmakers on rapidly changing areas of the law such as NLRB decisions, EEOC and DOL guidance, state legalization of cannabis, sick leave laws, and many more.

If you would like a quote for the creation or review of your employee handbook, or if you would simply like more information to determine whether your employee handbook should be reviewed or updated, please contact your Kutak Rock attorney or any of the attorneys in the firm’s [National Employment Law Group](#), and we would be happy to discuss this with you. You may also visit us at [www.KutakRock.com](http://www.KutakRock.com).

