Employee Handbooks:

Required Changes and the Most Common Mistakes

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Agenda

- What Your Employee Handbook Should Do
- Most Common Mistakes
- Latest Guidance and Best Practices

What Your Employee Handbook Should Do

- Preserve at-will status without violating the NLRA
- Communicate policies accurately and effectively
- Not create a contract – your organization must retain the right to make changes as you see fit and as the law changes
- Avoid over-zealous efforts at control. Micromanaging through excessive rules will often backfire.

Common Mistakes

Some common employer handbook mistakes

- Not keeping up with federal, state and local changes
- Using form handbooks or examples from other organizations without customizing to your organization
- Using probation inappropriately and creating a contract by doing so
- Being too specific with the rules
- Not updating the handbook whenever laws, court decisions or administrative agencies make changes
- Not including a specific, properly worded NLRB approved contract disclaimer (*The Accidental Contract*)

Common Mistakes

- Having handbook rules that differ from what managers are actually doing or expecting (Do as I say, not as I do).
- Rules that don’t match up with state or local laws that differ from federal rules – increasingly common
- Not updating handbook regularly and when something changes (why once a year may not be enough)
- Unrealistic rules that aren’t going to be followed no matter how much you want them to be.
- Having rules that go too far in their anti-union emphasis

National Labor Relations Board (NLRB)

- The NLRB administers the National Labor Relations Act (NLRA).
- The NLRA applies to most employers in the United States with a few exceptions.
- The NLRA governs what you can do to limit the right of employees to complain about working conditions, organize into unions and generally advocate for workers' rights – whether you are a union workplace or not.
- Over the last decade, the NLRB has been extremely active in regulating how you can treat employees when setting handbook rules.

NLRB Reports

- In March 2015, Obama administration NLRB General Counsel Richard Griffin issued a Report Concerning Employer Rules that he and the agency believe interfere with an employee's right to engage in so-called protected activities to better worker rights.
- Much of the report focused on very common handbook rules that employers have been using for years or even decades.
- Employers had to make changes or face potential unfair labor charges before the NLRB.

NLRB Report

- NLRB had been proactive in employer relations across union and non-union workplaces
- Major emphasis on handbook rules that discourage so-called “concerted activity” including employer limitations on speech, dress and social media postings
- NLRB did not like so-called ‘civility rules’
- Mayor changes now that board composition has changed and Trump admin has appointed majority Republican board. **However, the NLRB is NOT backing down from setting handbook rules.**

New rules or old rules?

- *Common employer handbook rules found unlawful*. The new GC requests submission of cases involving allegations of rules prohibiting “disrespectful” conduct or the use of employer trademarks and logos; rules governing "no camera" or "no recording"; and rules requiring employees to maintain the confidentiality of workplace investigations, among others.
- While the rules under the Obama administration were stricter, don’t assume those rules are all gone.
- Plus, some of the older rules may still represent best practices for many reasons.

NRLB has a new handbook rule test

The NLRB has already come up with a new test for balancing employee rights to concerted activity and employer rights to manage workplace.

- Question in Boeing case was whether a handbook rule banning cameras violated NLRA. Board said balance rights of employer and employee. In this case, the employer wanted to protect government classified documents from being copied and that justified the ban even though it might impact the right to engage in concerted activity (such as documenting bad working conditions)

NLRB and social media policies

Very recently (August 2019) the NLRB looked at a series of rules that an employer (CVS) had in place to address social media usage.

- CVS had a social media policy that included a disclaimer. Essentially, the rules said that nothing in these rules was intended to prevent employees from discussing working conditions.
- One rule stated that when using social media to address workplace problems or complaints, employees were required to use their real name and title or role if they discussed their work, the company, colleagues, or products in personal social media interactions.

NLRB and social media policies

- The NLRB said requiring self-identification in order to participate in collective action would be a substantial burden on employee rights under the NLRA.
- Although the CVS (and other employers) may have a legitimate interest in ensuring that readers know employees' postings were not made on behalf of the employer, the rule that required employees to clearly state they were not speaking as representatives of CVS protected this interest without requiring employees to self-identify.
- In other words, your handbook can require that employees state they are not posting on behalf of CVS, they could not be forced to ID themselves.

NLRB and social media policies

- CVS also had a handbook rule that said workers could not disclose “protected health information, personally identifiable information, and employee information.”
- NLRB said this rule was too broad. It’s fine to say employees can’t disclose customer or co-worker medical data without permission – but to lump the rule with one that adds information that a worker might reasonably conclude includes address, phone number and the like went too far.

NLRB and social media policies

Ruling said you can demand a disclaimer on all social media posts that discuss CVS in any way.

Thus, you can include a handbook rule that requires ALL employees who maintain social media accounts like a Twitter account to include something that says "all opinions or thoughts are my own" in their bios or a longer statement on Facebook accounts or personal webpages.

You can also say workers can't post "discriminatory, harassing, bullying, threatening, defamatory or unlawful or any content, images or photos that you don't have the right to use."

More info? See the [document here](#).

Using Form Handbooks

- Not specific to your company
- May contain irrelevant material – thus creating expectations you can’t or won’t deliver
- You can and should start somewhere – either with your own existing handbook or a template (from a reliable source, please)
- You must gather up all current employment policies so you can compare with template.
- You may find policies that make sense for your organization – if so, share with management for possible implementation. Otherwise, stick with your current policies.

Combining Conflicting Policies

- Do not include in handbooks:
  - Arbitration agreements
  - Collective bargaining agreements
  - Any information that changes frequently

The Probation Trap (*The at-will killer*)

- Telling employees they become “permanent employees” after completing a probation period can kill your employee’s “at-will” status in some states.
- Best bet is to avoid “permanent” nomenclature entirely.

Inconsistency with Company Documents

- Employee handbooks that conflict with other company documents give employees (and their attorneys) the option to choose the most favorable interpretation.
- Courts tend to construe documents against those who wrote them.
- Inconsistency confuses employees and managers.
- Your handbook need not include all policies (and should exclude anything that's essentially management guidance on how to manage workforce) BUT it must be consistent with those policies.

No Disclaimer
(*The accidental contract*)

- You must insert disclaimer stating the handbook is not a contract.
- Disclaim early and often.
- Beware how you word at-will employment statement – it’s a good place to add language clarifying that the handbook can change

At-will statement
(*The accidental no union clause*)

- "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

- DO NOT USE SUCH A STATEMENT!!!!

- Although there is clear movement away from draconian NLRA rules – this still represents best practices for other reasons.

NEW AND IMPROVED AT-WILL STATEMENT

- No manager, supervisor or employee has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing.

Conformity with State and Local Laws

- Another reason to not use a form “one size fits all” employee handbook. Your state may have unique laws – and most likely does.
- Increasingly, rules will differ by city or town, too.
- Any part of your handbook that conflicts with state law is invalid anyway. It just casts your company in a bad light.
- Sometimes, it makes sense to take the most restrictive rule you must follow in one location and expand it to all. Other times, that may not be the best move.

Failure to Update

- Employee handbooks must be updated to keep pace with:
  - Changes in federal law
  - Changes in state or local law
  - Changes in company policies and procedures
  - Changes in adminstration

Unrealistic Rules

- Why print a rule that doesn't have a prayer of being enforced?
- Unrealistic rules:
  - Open the company to ridicule and litigation
  - Be especially careful about rules that prohibit discussing pay.
  - Beware rules that purport to encourage civility but block ‘gossip’

Civility Rules

- Do you have a rule like this?

- “We do not allow negative comments about our fellow team members including coworkers and managers. Employees will not engage in or listen to negativity or gossip and will represent the company in the community in a positive and professional manner in every opportunity.”

- DO NOT USE SUCH A STATEMENT!

Civility Rules

- TRY THIS

- “We expect all our employees to treat each other and our customers with dignity and respect. That means that we do not use words that could be construed as harassing, degrading or offensive. If you have any questions about what is appropriate and what is not, please consult with an HR representative.”

Overly Broad Rules

- Rules that tell employees they can't complain about their employer.
- Courts don't like "control freak" employers.
- Rules should govern behavior when there is a legitimate business reason for doing so.

Confidentiality Rule

- What's the problem? Too broad because this prohibits discussing working conditions. Such rules against disclosing 'confidential information' such as handbooks, employee lists, pay or benefits violate NLRA.
- Employer response: Remove broad confidentiality rule in general handbook and review proprietary information rules in critical employee contracts.
- Yes, it's fine to have trade secrets and for HR professionals to protect confidentiality – but you must let employees talk among themselves

BAD DRESS CODE RULE

- Employees are expected to dress professionally and consistent with their position with the company. Men must be clean-shaven and have their hair no longer than the collar. Women must wear their hair in a professional style consistent with their position. No cornrows, braids or other distracting styles allowed. Employees may not wear any company or other logos (other than the company's)

GOOD DRESS CODE

- “All employees must dress for their position and must be clean, neat in appearance and free of any distractions that may impair health or safety in the workplace. Employees with questions about what is acceptable may contact the HR office for guidance. Our company remains committed to supporting our employees’ religious and cultural beliefs and will modify the dress code accordingly.”

“Over the Top” Anti-Union Statements

- Statements that imply union organizing activity constitutes “harassment” violates the NLRA.
- Factual statements can express company policy without violating the law.
- Rules that ban union insignia on clothing or even all insignia have recently come under scrutiny.

Rules on complaints

- Beware telling employees to take workplace complaints up chain of command.
- May violate NLRA because it chills efforts to take complaint elsewhere like union or NLRB.
- May represent a risk in the #MeToo era
- Better approach : We invite you to discuss workplace problems with HR or your supervisor.

Heated Argument Rule

- Do you have a rule against arguments?
- Be careful – may violate NLRA
- Modify no argument rule to state “We expect employees to refrain from physical contact, violence or other threatening behavior.”

Communicating with the Media

- Do not outright ban media contact.
- Do not require pre-approval before public statements or statements to media.
- Such rules ban publicizing labor disputes and violate NLRA.

Confidentiality during Investigations

- Do you have a rule like this?
- "Do not discuss an internal investigation with anyone other than company employees who are investigating this issue. Refer any co-workers or managers who want to discuss the investigation to the HR representative handling the investigation."
- Particularly a problem in #MeToo era as may be perceived as block to standing with victim. Employers should encourage bystander intervention – one of the specific recommendations by the EEOC

Confidentiality

- The rule on the last slide was found to interfere with the right to concerted activity because it purported to ban discussing working conditions.
- What should you do? Determine on a case-by-case basis whether the information must be confidential. Don’t use a blanket confidentiality rule. Run each situation by counsel before telling employees they can’t discuss investigation.

Pay discussions (Pay Transparency)

- Rule against discussing pay are common and problematic
- NLRA problem – concerted activity includes discussing pay
- EEOC was set to collect data on EEO form, but Trump DOL pulled requirement. Then court decision reinstated the requirement. EEOC currently collecting the data.
- Plus, some state and city rules against pay transparency – see specific state rules here: https://www.dol.gov/wb/EqualPay/equalpay_txt.htm

Solicitation rules

- **Soliciting other employees:** The NLRB considers rules banning solicitation during work “hours” or “business hours,” presumptively invalid. Solicitation rules should be drafted to allow employee solicitation during non-work time. The GC will treat electronic distributions of literature, such as through email, as coworker solicitations and subject to the rule permitting such communications during non-work time.

No Recording Rules

- Another suspect rule under the NLRA.
- Outright ban may not work anymore since it prevents workers from documenting safety concerns, interviewing coworkers, filming protests but …. The NLRB has already come up with a new test for balancing employee rights to concerted activity and employer rights to manage workplace.
- Boeing - balance rights of employer and employee. The employer wanted to protect government classified documents from being copied and that justified the ban even though it might impact the right to engage in concerted activity (documenting bad working conditions)

Making Your Employee Handbook Work

- Your employee handbook is:
  - A tool to inform your employees of company policies and procedures;
  - A quick reference for employees; and
  - A list of resources employees may seek out for more specific information.

Making Your Employee Handbook Work

- Your employee handbook is not:
  - A contract;
  - A detailed compendium of company policies and procedures;
  - Part of any arbitration agreement;
    - Nor should any arbitration agreement be part of it;
  - Part of a collective bargaining agreement;
    - Ditto for CBAs.

Some must have handbook clauses

- Anti-discrimination and harassment policies.
- Check for state smoking bans
- Electronic communications policy
- Overtime and attendance policies

Overtime and off-the clock work

- Consider a rule discouraging in strong terms overtime or off-the-clock work.
- Include statement that unapproved overtime will result in possible disciplinary action for employee and manager
- Clarify that company policy is to prohibit off-the-clock work even if ‘voluntary.’
- If you converted employees from exempt to hourly in anticipation of new OT rules – make sure they understand their new status on OT hours.

Maternity and Paternity Leave

- Some states and localities have expanded leave, including limited paid leave. Check your state and city. http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx
- San Francisco now requires employer paid parental leave fully paid (45% by employer) and New York state passed phased in paid leave funded by payroll deductions.
- Remember that child birth leave for fathers should be considered on par with for mothers other than if leave is related to the mother's physical recovery. If leave is for child's care, it must be equal. More men are suing.

Mother's Room

I've yet to see a handbook that includes this important update

- The ACA (AKA Obamacare) mandates most employers provide a space that is not a bathroom for new mothers to express milk
- Covers virtually all employers – those with more than 50 workers and others unless they can show economic hardship
- Unlimited breaks for hourly mothers to express milk and a place to store it.
- www.dol.gov/whd/regs/compliance/whdfs73.htm

New Posters

- FLSA poster with nursing mother, IC rights: https://www.dol.gov/whd/regs/compliance/posters/minwage.pdf
- DOL polygraph rights poster: https://www.dol.gov/whd/regs/compliance/posters/eppac.pdf
- Revised FMLA rights poster with direct link to DOL website: https://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf

Arbitration?

- If you want to include arbitration as remedy for employment (and other) disputes, make it a separate agreement.
- Note that the Supreme Court has recently confirmed that is may be appropriate to include a class action waiver in arbitration agreements – good news for employers
- Still, does not mean that you should act without counsel. Arbitration agreements are still contracts and must conform to state contract laws on conscionability and proper format

What to expect from Trump Administration

- Some sort of paid maternity leave – UC based or take from Social Security and delay retirement are proposals
- New overtime rules go into effect January 1, 2020

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