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Labor Relations and Employment
www.joneswalker.com
labor@joneswalker.com

This is the first of a three-part series on the importance of employee handbooks. If you have any questions, please do not hesitate to contact any of our Labor and Employment attorneys at (504) 582-8000.

AN EFFECTIVE EMPLOYEE HANDBOOK

By: Robert B. Worley, Jr. and Antonio D. Robinson

1. Reasons to Have a Handbook

There is no law that requires you to have an employee handbook. Additionally, if you have a handbook, it doesn't necessarily follow that you will be in a better position to prevent or defend a lawsuit. So why go to the trouble?

First, every employer has employment policies and procedures, some in writing and maybe some not in writing. If you don't have a handbook, your policies probably are scattered all over the company in the form of memos to your employees or notices on your bulletin boards. They also may be in a binder collecting dust on a shelf in some manager's office. Some of your policies about how to deal with particular situations and issues may even be left to someone's memory about how things have always been handled.

The danger inherent in all these scenarios, of course, is that nobody really knows what your policies are, and the way you've always handled things is actually pretty inconsistent—which increases your risk of exposure to employee lawsuits.

Wouldn't it be better to have all your policies memorialized in an employee handbook? Wouldn't your employees be better informed about your policies, procedures, rules, and expectations? And wouldn't it be better for your supervisors and managers to have a single source to make sure their personnel decisions and actions are consistent with your policies and practices?

If you take the time to consolidate your personnel policies in a thoughtfully crafted handbook, you'll do a better job of making sure your employees know the rules and what's expected of them, and your supervisors will do a better job of keeping you out of trouble. Although an employee handbook will not guarantee success in preventing or winning a discrimination lawsuit, you'll certainly be a lot better off with a thoughtfully and carefully written handbook than with a bunch of memos and notices

strewn about or a set of unwritten policies and procedures that no one seems to remember the same way.

So—all things considered—it's much better in this day and time to have a handbook than not to have one, but only if it's thoughtfully and carefully crafted.

2. Contents for the handbook

Again, there's no law that requires your handbook to contain any particular policy or procedure—with the one exception of the Family and Medical Leave Act (FMLA) policy noted below. Nevertheless, there are a broad range of subjects that are commonly included in employee handbooks. Consider the following:

- a brief history of the company;
- a statement of the company's purposes or goals;
- an equal employment opportunity or nondiscrimination statement;
- normal work hours, meal periods, and breaks;
- policy on absenteeism and tardiness;
- safety rules;
- health, life, dental, and/or other insurance;
- holidays;
- leave of absence policies, like sick leave, FMLA leave (the FMLA requires you to have an FMLA policy in your handbook *if* you have a handbook), bereavement leave, personal leave, military leave, and jury duty leave;
- e-mail and telephone policies;
- statement about the company's monitoring (electronically or otherwise) of employees while they are at work;
- progressive discipline policy, including explanation of the termination policy;

- pension and/or profit-sharing plan;
- vacation policy;
- workplace harassment policy;
- smoking policy; and
- drugs in the workplace/drug testing policy

Again, what you include is up to you. Many of the items listed here (and others you may think of) may be subject to federal and/or state regulations. Therefore, it is essential that you obtain legal advice in putting together your handbook.

3. Mandatory contents (if you have a handbook)

If an employer is going to have a handbook, there are certain policies that should be included in the handbook to help minimize an employer's exposure to employee lawsuits.
These policies include:

- Statement Regarding At-Will Employee Relationship;
- Equal Employment Opportunity Statement;
- Affirmative Action Policy for Certain Government Contractors and Subcontractors;
- Policy Regarding Sexual and Other Types of Harassment in the Workplace;
- Internet Access/E-Mail/Voice Mail Policy; and
- Family and Medical Leave Act.

a. At-Will Employee Statement

Employers should include language in their handbooks confirming that all employees are employed at-will, meaning that their employment is not guaranteed for any specified duration. This statement should be direct and to the point, such as:

> Nothing contained in this handbook is intended to create, nor creates, an expressed or implied employment contract. Your employment relationship with the company is voluntary on the part of both the company and you, and either party may terminate that relationship with or without notice or cause.

This at-will language should appear in bold, large type at the beginning of the handbook and on the acknowledgment/signature page of the handbook.

By making the employment at-will policy a part of the handbook, disgruntled employees (and their lawyers) should be discouraged from filing a "wrongful discharge" or "breach of employment contract" lawsuit.

b. EEO Statement

One of the first policies contained in the employee handbook should be a reaffirmation of the company's policy of non-discrimination in all matters relating to employment practices and procedures. The policy should state that the company provides equal employment opportunities without regard to race, color, age, sex, national origin, religion, disability or veteran status. The policy should also state that the company's commitment to equality extends to all personnel actions including: recruitment, advertising or soliciting for employment, selection for employment, determining rates of pay or other forms of compensation, performance evaluation, upgrading, transfer, promotion, demotion, selection for training or education, discipline, suspension, termination, treatment during employment, and participation in social and recreational programs.

c. Affirmative Action Policy

If an employer is a government contractor or subcontractor with 50 or more employees, and the contract is $50,000.00 or more, Executive Order 11246 requires that the employer develop written Affirmative Action Plans for females and minorities, disabled persons, special disabled veterans and Vietnam era veterans. Also, in accordance with Executive Order 11246, such government contractors are required to include in their equal employment opportunity policy statement (discussed above) that the company has implemented Affirmative Action Programs and invites qualified individuals with disabilities, special disabled veterans and Vietnam era veterans to identify themselves if they wish to do so. The policy should also provide that

the Affirmative Action Plans are available for employees to review. Such policy must be reaffirmed annually and posted on the employee bulletin board.

d. Sexual and Other Types of Harassment Policy

About three years ago, the United States Supreme Court issued two decisions that effectively require that employers adopt strong anti-harassment policies. *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). In these two cases, the Supreme Court outlined an affirmative defense for employers in the unfortunate situation where a supervisor is accused of harassing an employee. Consistent with the defense outlined by the Supreme Court, an employer may escape liability if it can show:

1. it exercised reasonable care to prevent and promptly correct any harassing conduct; and

2. the employee failed to take advantage of any preventative or corrective opportunities offered by the employer.

A strong anti-harassment policy is extremely helpful in establishing both elements of this defense. The policy should include:

1. a clear statement that harassment of any type is forbidden;

2. illustrative examples of harassing conduct;

3. a procedure for reporting complaints of harassment, including specific individuals to receive complaints (upper management —not first line supervisors) and possibly a 1-800 number; and

4. an anti-retaliation provision.

Also, considering that the employer's immediate supervisor is often the alleged harasser, the policy should list managers, other than the supervisor, to whom an employee can complain.

e. Internet Access/e-mail/voice Mail Policy

In order to reduce the potential of liability from lawsuits allegedly

sexual harassments, defamation and invasion of privacy, employers should create and implement a clear e-mail, voice mail and internet policy to reduce employees' expectations of privacy, as well as set clear boundaries for employee conduct with respect to electronic communications. The policy should specify that the communications systems are the property of the employer and are subject to monitoring at any time, with or without notice, at the sole discretion of management. The following is a list of elements that should also be contained within an electronic communications policy, subject to the employer's specific needs:

1. Your policy should notify your employees that your e-mail system is intended for business use and that you reserve the absolute right to review, audit, and disclose all matters sent or received over your systems or placed into its storage.

2. Your policy should state specifically that employees are prohibited from using your system to send or receive any improper communications, e.g., any material that is derogatory, defamatory, obscene, or otherwise inappropriate for the workplace.

3. Your policy should relieve your employees of any possible expectation of privacy in their use of your system.

4. Include your employees' use of online message boards in your policy. You can be held liable for information your employees post on message boards, even those not sponsored by your company. Your policy should inform your employees that posting unlawful information (for example, insider trading information) or messages that violate company policy will subject employees to disciplinary action.

5. Your policy should be accompanied by a form that employees are required to sign to acknowledge their agreement as a condition of employment that you have an absolute right to monitor their use of your system and access any information contained in your system.

6. Your policy should be consistent with your no-solicitation/no distribution of literature rule. Your policy should include all solicitations and distributions for charitable, personal, business, or other purposes. Without mentioning it, the reference

to "other" solicitations will allow you to prohibit union solicitations as long as your policy is consistently applied.

7. Your policy should contain a warning that deleting a message from your e-mail system may not fully eliminate the message from your system.

8. Your policy should clearly state that any violation will result in disciplinary action up to and including discharge.

9. Even with a strong policy statement allowing your company to monitor your employees' e-mail and Internet use, actual monitoring of electronic communications should be limited to situations where your monitoring is necessary to protect your business purposes. You should use the least intrusive method of monitoring your employees' communications and minimize intrusion into personal communications.

10. To reduce the risk of defamation or invasion of privacy claims by your employees, limit distribution of information obtained from monitoring employee e-mail to managers who have a legitimate need to know.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

H. Mark Adams
Jones Walker
201 St. Charles Ave., 47th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8258
fax 504.582.8015
email: madams@joneswalker.com

Sidney F. Lewis, V
Jones Walker
201 St. Charles Ave., 47th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8352
fax 504.589.8352
email: slewis@joneswalker.com

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www.joneswalker.com
labor@joneswalker.com

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[1] Also admitted in Mississippi
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