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Following is Part II of our three-part series on employee handbooks. For your convenience and ease of reference, we have included Part I, which was published last month. 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

PART I

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 dis-

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crimination 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 is a broad range of subjects that are commonly included in employee handbooks. Consider including the following:

- a brief history of the company;
- a statement of the company's purposes or goals;
- an equal employment opportunity or nondiscrimination statement;
- an explanation of normal work hours, meal periods, and breaks;
- the policy on absenteeism and tardiness;
- safety rules;
- information on health, life, dental, and/or other insurance;
- a list of 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;
- a statement about the company's monitoring (electronically or otherwise) of employees while they are at work;

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- a progressive discipline policy, including an explanation of the termination policy;
- an explanation of the pension and/or profit-sharing plan;
- your vacation policy;
- a workplace harassment policy;
- a smoking policy; and
- a 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 (EEO) 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

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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 nondiscrimination 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; upgrade; 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

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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 antiharassment 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 antiharassment 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 antiretaliation 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.

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e. **Internet Access/E-mail/Voice Mail Policy**

In order to reduce the potential of liability from lawsuits alleging sexual harassment, 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,

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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.

Remember, 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. 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.

PART II

f. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires that employers provide employees with general information on their rights under the FMLA. This information must be permanently posted on the employee bulletin board and, if not included in an employee handbook, an FMLA Fact Sheet must be given to every employee. (To obtain an FMLA Fact Sheet, please contact the Jones Walker attorney with whom you work.)

Additionally, an employer’s FMLA policy should include the following:

1. Generally explain employees’ rights and obligations under the FMLA.
2. The policy should specify that employees are eligible for up to 12 weeks of unpaid leave of absence during each rolling 12-month period. If this is not included in the policy, it is assumed that the employee is entitled to 12 weeks of unpaid leave during

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each calendar 12-month period, which conceivably would allow an employee to take 24 consecutive weeks—12 weeks at the end of one calendar year and 12 weeks at the beginning of the next calendar year.

3. The policy should specify whether medical certification and re-certification during the employee's leave of absence is required.
4. The policy should specify whether employees will be required to use all available paid leave during their FMLA leave.
5. The policy must also specify whether an employee returning from medical leave is required to present a current medical certification that the employee is able to return to work.

4. Other Common Policies

a. Fraternization Policy

An antifraternization policy should first clearly express that it is not the employer's intent or desire to interfere with or regulate personal behavior of employees outside the workplace. The policy should also express that the employer's purpose is to ensure that personal relationships between employees stay outside the workplace and do not interfere with or disrupt business operations or jeopardize working relationships with other employees. The policy should clearly define the individuals to whom it applies, such as employees working in the same location or department, employees in a direct or indirect supervisor/subordinate relationship, one or more of these or other categories of employees, or all employees. The policy should also define the conduct to which it applies so that employees are aware when their conduct implicates the policy.

Most antifraternization policies require any violating employee to report the violation to a supervisor or human resources personnel. Employers should always provide more than one reporting route in the event that the individual to whom violations are to be reported is one of the offending employees. The policy should also make clear that employees who are in violation of the policy and fail to properly report their personal relationship may be subject to disciplinary action up to and including discharge.

b. Nepotism Policy

Typically, antinepotism policies prohibit employees who are related

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from working in the same department or working in a direct or indirect reporting or supervisor/subordinate relationship with one another. An anti-nepotism policy should contain the same elements as an antifraternalization policy.

c. Drug Testing Policy

An effective drug and/or alcohol testing policy should contain the following substantive elements, at a minimum:

1. A statement expressing the policy's purpose and indicating that it is reasonably employment-related;
2. A clear statement of the conduct prohibited;
3. An express condition that written consent to drug and alcohol testing is required for the affected employees, including a description of the types of testing and when and under what circumstances the company will require such testing;
4. A confidentiality provision assuring employees that all results will be handled confidentially and disseminated only on a need-to-know basis; and
5. The consequences for refusing to submit to a test, adulterating a specimen, or testing positive.

Employers may wish to implement multiple types of drug testing. Louisiana, unlike some other states, does not specifically prohibit any particular type of drug testing, the most common of which are:

1. Pre-employment;
2. Post-accident;
3. Reasonable suspicion or cause; and
4. Random.

Louisiana also encourages employers to adopt drug and alcohol abuse treatment plans by offering a tax credit to employers who do so. La. R.S. 47:6010. To qualify for the tax credit, the employer's plan must meet the following requirements:

1. The plan must cover crisis intervention, including assessment, diagnoses, and referral, in-patient detoxification services, non-

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hospital residential alcohol and drug treatment services, outpatient alcohol and drug treatment services, and family codependency treatment;

2. The contributions and benefits under the plan, whether applicable to individual employees or a group of employees, must not discriminate in favor of highly compensated employees or their dependents;
3. The plan must not include any eligibility requirement or any limitation on benefits based on prior or existing alcohol and/or drug abuse or health conditions; and
4. Reasonable notification of the availability and terms of the plan must be provided to eligible employees.

The benefit to the employer is a credit against its state income tax in the amount of 5% of the qualified treatment expenses for substance abuse paid or incurred by the employer during the taxable year, with the exception of preemployment medical examination or drug testing costs.

d. Workplace Violence Policy

Although employers may not be able to entirely eliminate the potential for workplace violence, a written policy containing the following elements may not only reduce that potential but may also provide employers with a defense against lawsuits arising out of workplace violence:

1. A clearly expressed “zero tolerance” position on workplace violence;
2. A nonexclusive list of behaviors that may be viewed as violence and that may be a violation of the policy;
3. An unequivocal statement that employees who engage in any violent behavior may be subject to immediate disciplinary action, up to and including discharge;
4. A provision requiring employees to report any suspected or potential violation of the policy, whether the violent behavior is only threatened or actually carried out;
5. The consequences for failing to report policy violations;

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6. An assurance that all reports of potential or actual violations will be promptly investigated and that corrective action will be taken, if necessary;
7. An antiretaliation provision for employees who report or participate in an investigation of workplace violence; and
8. Information where offenders and victims may get immediate help (i.e., 911, local law enforcement, on-site security, rehabilitation and counseling services, etc.).

e. **Smoking Policy**

Many employers may not know that Louisiana law prohibits employers from discriminating against an individual with respect to discharge, compensation, promotion, any personnel action, or other condition or privilege of employment because the individual is a smoker or nonsmoker. It is also unlawful to require as a condition of employment that an individual abstain from smoking or otherwise using tobacco products outside the course of employment. La. R.S. 23:966. However, employers are allowed to adopt a policy regulating workplace use of tobacco products.

Louisiana has also enacted the Office Indoor Clean Air Act, which requires that all employers adopt, implement, and maintain a written smoking policy. The policy must be announced to all employees and posted on the employer's premises. The policy must provide, at a minimum, that any nonsmoking employee may object to the employer about smoke in his or her office workplace. Upon receipt of such a complaint, the employer must attempt, by using already available means of ventilation or separation or partition of office space, a reasonable accommodation between the smoking and nonsmoking employees. Moreover, any areas where smoking is prohibited must be clearly identified. La. R.S. 40:1300.21.

f. **Policies Concerning Unions**

Employers should never inquire about the union membership of a prospective employee. The United States Supreme Court has determined that an applicant may have the right to sue an employer under the National Labor Relations Act if the employer inquires about union membership prior to employment, even if the applicant is being paid by a union to help organize other employees. *NLRB v. Town & Country Electric, Inc.* Of course, the employer may refuse to hire the applicant for legitimate reasons unrelated to

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union affiliation, such as failure to follow instructions on the application or violating the employer's moonlighting policies, among others. Thus, an employer who would like to avoid unionization may have an appropriate management official read a statement to all new employees stating facts, opinions, and examples relating to union activity. For example, an employer may begin with a general statement of its position regarding unions, such as:

It is my pleasure to welcome you to the Company and to let you know that we are looking forward to you working for the Company. Before you actually begin work, I have an important statement I would like to read to you concerning the Company's position on unions. We do not have a union here at the Company and do not want one in the future. We want you to understand that the Company opposes unions based on the fact that unions have caused problems at other companies with strikes and picket lines and that the Company does not believe that strikes and picket lines are in the best interest of the employees. The Company believes in treating employees fairly and will put forth its best effort to make this the best possible place to work for all employees. If you ever have any problems, whether they relate to work or not, you should feel free to discuss them with your supervisor or any other member of management at any time.

Of course, if an employer has had specific experiences with unions, such as a successful election or a loss of production time due to a strike or picket, the employer may wish to generally reference those experiences in the statement. Finally, an employer may provide information to new employees about what to do when approached by an organizer, such as:

If anyone promoting a union ever approaches you and asks you to sign a card or any other document, we recommend you politely refuse. That person may be an outside union organizer or even one of your fellow employees here at the Company. Your signature on the dotted line is a serious matter with legal consequences, so do not let anyone pressure you or take advantage of your friendship to get you to sign something without first letting you get all of the facts. If you ever want the facts about unions, you have the right to ask your supervisor or any other manager at the Company. We be-

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lieve that you will find the work here at the Company rewarding, and we are glad to have you as a member of our team.

This type of statement to new hires includes only the employer's facts, opinions, and examples of union organizing and its effects, which is consistent with the free speech rights of employers regarding unions.

g. Solicitation Policy

A no-solicitation policy should never specifically reference unions but should generally describe the prohibited conduct. The policy should specify the temporal and geographic limitations on the prohibited conduct. For example, the policy should state that employees are not allowed to solicit or distribute literature during working time or on the employer's property. The policy should also clearly reserve the right to use bulletin boards for management only. Likewise, if the employer allows employees to engage in certain types of solicitation or distribution, the policy should clearly explain what conduct is permitted.

h. Policies Regarding Workweeks, Pay Periods, and Paydays

By law, all employers must establish their regular workweek consisting of seven (7) consecutive days, but you have the discretion to decide on what day you want your workweek to start and on what day you want it to end. So, most employers decide what their workweek will be and stick with it. And your handbook should specify what it is.

Next, your handbook should specify what your pay period is. Most employers pay semimonthly or biweekly (*i.e.*, every other week). Whatever your pay period is, your handbook should specify it.

And, perhaps most importantly, your handbook should inform employees what day is payday. Whatever day it is should be specified in your handbook. And your handbook also should inform employees when they will be paid if the regular payday falls on a holiday or weekend. In most cases, this will be the last business day before the holiday or weekend. Whatever the day, your handbook should state it.

i. Overtime Policy

By law, all employees are classified as either exempt or nonexempt

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for overtime purposes. Nonexempt employees are entitled to overtime compensation (one-and-one-half times their regular hourly rate) for all hours worked in excess of 40 in a workweek. Exempt employees are not entitled to overtime compensation. Therefore, your handbook should include a clear, concise statement about who gets overtime and who doesn't.

j. Payment for Vacation and Sick Leave Upon Termination

Your handbook probably will include separate sections dealing with vacation and sick leave. In addition to spelling out how much vacation and sick leave you provide, how employees can use vacation and sick leave, etc., your vacation and sick leave policies should include a statement concerning what happens to an employee's vacation and sick leave when employment terminates.

In Louisiana, employers are required by law to pay former employees all compensation due by the next regular payday but no later than 15 days following termination or resignation. Therefore, your handbook should include a statement that employees are paid for all unused vacation upon the termination of their employment. This informs employees what to expect and, perhaps more importantly, helps prevent costly mistakes by your accounting or payroll department.

The same rules do not apply to sick leave. Therefore, your handbook also should include a clear statement that unused sick leave is not paid to employees upon the termination of employment—unless, of course, it's your *voluntary* policy to pay terminating employees for unused sick leave.

k. Benefits Policy

Let your summary plan descriptions describe your benefit plans. Don't try to do it in your handbook. Don't even list the benefits you provide in your handbook without a qualifying statement such as the following:

At the present time, we offer eligible employees the opportunity to participate in the following benefit plans: [insert list of plans]. Summary Plan Descriptions (SPDs) describing each benefit plan offered, the benefits available, and the eligibility requirements are distributed to all eligible employees. Each plan is subject to change or termination by the Company at any time. For information concerning benefit plans available at any particular time and the benefits available and the

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eligibility requirements under each plan, please consult the Human Resources Department.

Nothing more need be said about benefits in your handbook.

Look for the third and final part of our series on employee handbooks in next month's publication.

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:

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