JONES WALKER

E*ZINES
November 2007 Vol. 43

Labor & Employment
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PROVISIONS OF AN EFFECTIVE EMPLOYEE HANDBOOK

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The following is the second of a two-part series. To read Part I, please click here.

Q. Sexual and Other Types of Harassment Policy

Almost ten 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) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). In these two cases, the Supreme Court outlined an affirmative defense for employers where a supervisor or employee is accused of harassment. 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 the possibility that the employer's immediate supervisor is the alleged harasser, the policy should list managers, other than the supervisor, to whom an employee can complain.

R. No Solicitation Policy

Many times an employer's handbook solicitation policy is too broad, wherein the employer prohibits solicitation on company premises at any time. This is violative of the National Labor Relations Act. An employer must allow employees the opportunity to solicit each other while both are not working, such as breaks, lunch periods, and before or after work. With regard to the distribution of literature, employers can prohibit the distribution of literature in work areas at any

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time. Furthermore, it is extremely vital to have language regarding the use of bulletin boards. If an employer allows employees to solicit via a bulletin board, then it will not be able to prevent a union solicitation on bulletin boards. For example, if employees are allowed to advertise the sale of puppies, Girl Scout cookies, or other items on the bulletin board, then management will run afoul of the National Labor Relations Act if it demands the removal of any union-related solicitation. In sum, bulletin boards should be for management's use only, and should exist only for the posting of federal or state posters, company policies, or company-sponsored benefits.

S. Union Free Statement

A union free statement can be contained in the employee handbook or can be read to employees after they have been given an offer of employment. The National Labor Relations Board has recently struck down as coercive various strongly worded union-free policies. While you have the absolute right to give employees your opinion on your desire to have a union-free workplace, you should have the statement checked by counsel for compliance with the National Labor Relations Act.

T. Performance Evaluations

If there is any information about performance evaluations in the employee handbook, the employer should ensure that it follows its own published policy with timely and accurate performance evaluations. If an employer sets forth a policy and/or practice of using performance evaluations and fails to follow it, then same may be used against the employer in an employment lawsuit.

U. Discipline Policy

Flexibility is the key with any published discipline policy. Many times employers segregate violations as first warning offenses, suspension offenses, or termination offenses. This is problematic. While a handbook may not constitute a contract of employment in your jurisdiction, an employer should never limit itself in what type of discipline it will take with regard to a workplace infraction. All infractions should be listed together, and employers should reserve the right to take any discipline, up to and including termination, for the violation of any rule or the commission of any offense.

V. Attendance Policy

Publication of an attendance policy is a good idea. However, it must be administered in conjunction with the numerous laws that protect absences, such as family and medical leave, military leave, jury duty, maternity leave, and other state or federal laws. When an employer terminates an employee for attendance, those absences should be carefully audited to ensure that protected absences were not inadvertently counted in the discipline.

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W. Internet Access/E-mail/Voice Mail Policy

In order to reduce the potential of liability from lawsuits alleging sexual harassment, defamation, and/or 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 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.

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

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

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8. 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.

X. Workplace Violence Policy

Every handbook should contain a workplace violence policy. There should be zero tolerance for any express or implied threats among employees. Given the violent incidents experienced in U.S. workplaces in the past decade, employers should always take immediate action whenever threats are made. Courts will not be sympathetic to those terminated for expressed or implied threats of violence.

Y. Dress Code Policy

We receive many questions on the propriety of dress code policies, as well as personal grooming issues (such as tattoos, piercings, etc.) Employers have the right to enforce standard social norms for male and female employees, though some may differ. Issues may arise with regard to religious accommodation and/or disparate treatment, and counsel should be sought any time challenges are made to the dress code or personal grooming policy.

Z. Drug Testing Policy

The wording of your drug test policy will most likely be governed by state law. Policies may contain provisions on pre-employment, random, reasonable suspicion, and/or post accident testing. Many states provide for workers' compensation discounts with the publication of a drug test policy, and/or the disqualification of the workers' compensation or unemployment benefits for positive test results. Your policies should track your state's legal requirements. Other employees may also have federal drug testing requirements which mandate more detailed drug test policies. It is imperative that an employer ensure that its drug test policy comports with federal law (if applicable) and relevant state law.

AA. Open Door Policy

Many employers feel the need to state that they have an open door policy and provide avenues to grieve. While this is admirable, if it is published it should be followed. If an employer experiences issues with the open door policy, then they may want to consider removing it.

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BB. Reimbursement for Uniforms, Equipment, etc.

Some employers provide provisions for the recoupment of the cost for uniforms, equipment, and other items given to employees. While such a policy may be allowed in your state, it is usually advisable for an employee to have a separate, signed agreement with the employee regarding their reimbursement obligations, and state law must be checked to ensure that said agreements do not constitute a legal problem.

CC. Handbook Disclaimer

This is an important provision. In the disclaimer you should indicate that the individual's employment is at will and that the handbook does not constitute a contract of employment. Employers should also indicate that no one has the authority to create a contract of employment other than a specified individual. While it is not a good practice to deviate from the provisions in an employee handbook, you want to make it clear that management has that right, in its discretion, to deviate from the handbook at any time and take any action deemed appropriate.

DD. Signature Page

The signature page on the employee handbook is extremely important. It should be removed from the handbook and placed in the personnel file. Handbook disclaimer language discussed above should be contained in the signature page. It may be preferable to have such strong language removed from the handbook and placed in the personnel file.

3. Conclusion

In sum, handbooks are necessary to provide organization and peace of mind for employees. They provide guidance to your management team. Like your car, your handbook should be regularly inspected and fine-tuned to stay current with applicable legislation and case law.

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(Please contact Sid Lewis for more information on these seminars.)

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"Employment Law From A to Z in Louisiana"
Sidney F. Lewis, V
November 7, 2007 – New Orleans, Louisiana

National Employment Law Update
"Five Rules for Avoiding Legal Pitfalls in Recruiting and Hiring"
H. Mark Adams
November 8–9, 2007 – Lake Buena Vista, Florida

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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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