



Uses and Misuses of Employee Handbooks

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**EMPLOYEE
HANDBOOK**

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USES AND MISUSES OF EMPLOYEE HANDBOOKS

Written by Susan M. Corcoran, Esq.

If you do not have an employee handbook, you should consider whether it makes sense to adopt one. If you already have an employee handbook, you should evaluate whether the handbook is playing an appropriate role. Below are some common reasons why employers choose to have an employee handbook, as well as some common misuses of employee handbooks.

A. Key Reasons to Have an Employee Handbook

The most basic reason to have an employee handbook is to communicate certain substantive information to your workforce as a whole. This information tends to fall into three main categories:

- 1. The employer's general employment policies or practices.** Examples are the employer's commitment to Equal Employment Opportunity, its job posting practices, and its leave benefits and policies.

- 2. Employees' basic responsibilities to the organization.** Examples are the employee's responsibility to properly reporting absences, to refrain from unlawful harassment, and to seek guidance about potential conflicts of interest.

- 3. Important rights or privileges of the employer.** Examples are the rights to monitoring how employees use the employer's electronic communications resources, and to search employees' work areas or possessions.

Including information like the above in an employee handbook may have several practical and legal advantages:

- It promotes employees' understanding of important terms and conditions of employment.
- It may help educate employees about the organization's history, values and objectives.
- It creates a ready resource for employees and supervisors to use in answering common questions.
- It may help the employer be more consistent in its treatment of similar situations. This tends to reduce the risk of liability for employment discrimination, retaliation and other common employee claims.
- It may serve as evidence reflecting the terms of the employment "deal" between the employer and its employees. This can be important in defending

against certain employee claims, such as some types of wage-hour claims.

- It may help the employer show that any employee has given “implied consent” to certain employment conditions, such as monitoring or searches.
- It may help the employer prevent unlawful or unethical conduct, such as unlawful discrimination or harassment.
- It may help the employer avoid liability for some types of improper employee conduct. For example, in sexual harassment cases, the employer’s defense often includes a showing that it had a well-designed anti-harassment policy with an effective complaint procedures; that this policy was broadly disseminated throughout the workforce, and that the plaintiff unreasonably failed to use the employer’s procedure.

Information like this in an employee handbook helps to answer common employee questions, and gives employees a clearer understanding of important terms and conditions of employment. In addition, certain policies—like the anti-harassment policy—can themselves be cited as defenses to liability.

Many employers also view their employee handbook as an important tool in promoting positive employee relations, so as to attract and retain the most qualified employees. Employee handbooks have become such a standard human resources

practice that some organizations adopt a handbook partly as a way of maintaining or improving their competitive standing as an employer. Moreover, an employee handbook can be an effective tool for educating employees about the organization's history, values and objectives, which can increase the workforce's cohesiveness and its sense of shared purpose.

B. Misuses of Employee Handbooks

Legal problems may follow when an employer tries to use its employee handbook for broader purposes than just communicating general information to with the workforce and promoting positive employee relations. An employer that tries to use its employee handbook for broader purposes may end up undermining employment-at-will status and creating contractual obligations to its employees. These problems can arise in a number of ways:

- 1. An employee handbook is not an HR encyclopedia.** The employee handbook should not attempt to provide a comprehensive set of instructions or procedures for the employer's supervisors, managers or HR staff. Being too specific in an employee handbook may deprive the organization of needed discretion and flexibility. It also could cause a court to conclude that the employment relationship was not "at will," because the employer made promises of "specific treatment in specific situations."

Specificity is more dangerous in some handbook sections than in others. Areas where it is especially dangerous to provide too much detail include any discussions of:

- Reasons or procedures for discipline, layoff or termination;
- Performance or conduct standards;
- Performance evaluations; and
- The employer's process for determining compensation, bonuses, raises, or for deciding on promotions.

2. An employee handbook is not a vehicle for controlling the employer's supervisors and managers. Employers should resist the temptation to use their employee handbooks as a place for detailing who has the authority to take specific actions, or what procedures must be followed in order to take a particular action, or what circumstances must be present before a certain decision may be made. It's generally a bad idea to include such details in an employee handbook, as provisions like these can undermine "at will" employment status and fuel employee claims. For example, employees' attorneys may cite such provisions to support arguments that the employer has made enforceable promises of specific treatment

in specific situations, precluding “at will” termination, or that the employer's action is wrongful, discriminatory, retaliatory, etc., because the employer’s action violated some provision of the employer’s handbook.

- 3. An employee handbook is not a catalog of employees’ rights or benefits.** The confusing array of employees’ legal and contractual rights sometimes prompts employers to try and cover all of these in the employee handbook. This effort is destined to fail, because the relevant laws and regulations are constantly being revisited and revised by our federal and local legislatures as well as the courts and the enforcement agencies. Similarly, the terms of many employee benefits plans change annually. Thus, including detailed information about employees’ legal and contractual rights will necessitate frequent updates to the employee handbook. Even worse, however, paraphrasing such information in the employee handbook can actually create additional liabilities for an employer. For example, the language of an employer’s handbook might be construed as giving employees greater rights or benefits than what was established in benefits plan document, in an offer letter or employment contract, or through other external law.
- 4. An employee handbook speaks to the employer’s employees, not to others.** A final

common mistake is trying to use the employee handbook to address audiences other than the employer's employees.

- There is no need to use the employee handbook to define pre-employment procedures—by definition, those procedures have run their course by the time the employee receives the handbook.
- Similarly, an employee handbook should not be used to define instructions or procedures for independent contractors or workers who are engaged through a temporary staffing agency. Including material that is addressed to such non-employees can contribute to disputes over whether those persons actually qualify as “employees” who are entitled to the benefits described in the employee handbook.

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