Drafting Your Handbook: *How You Say It May Be As Important As What You Say*

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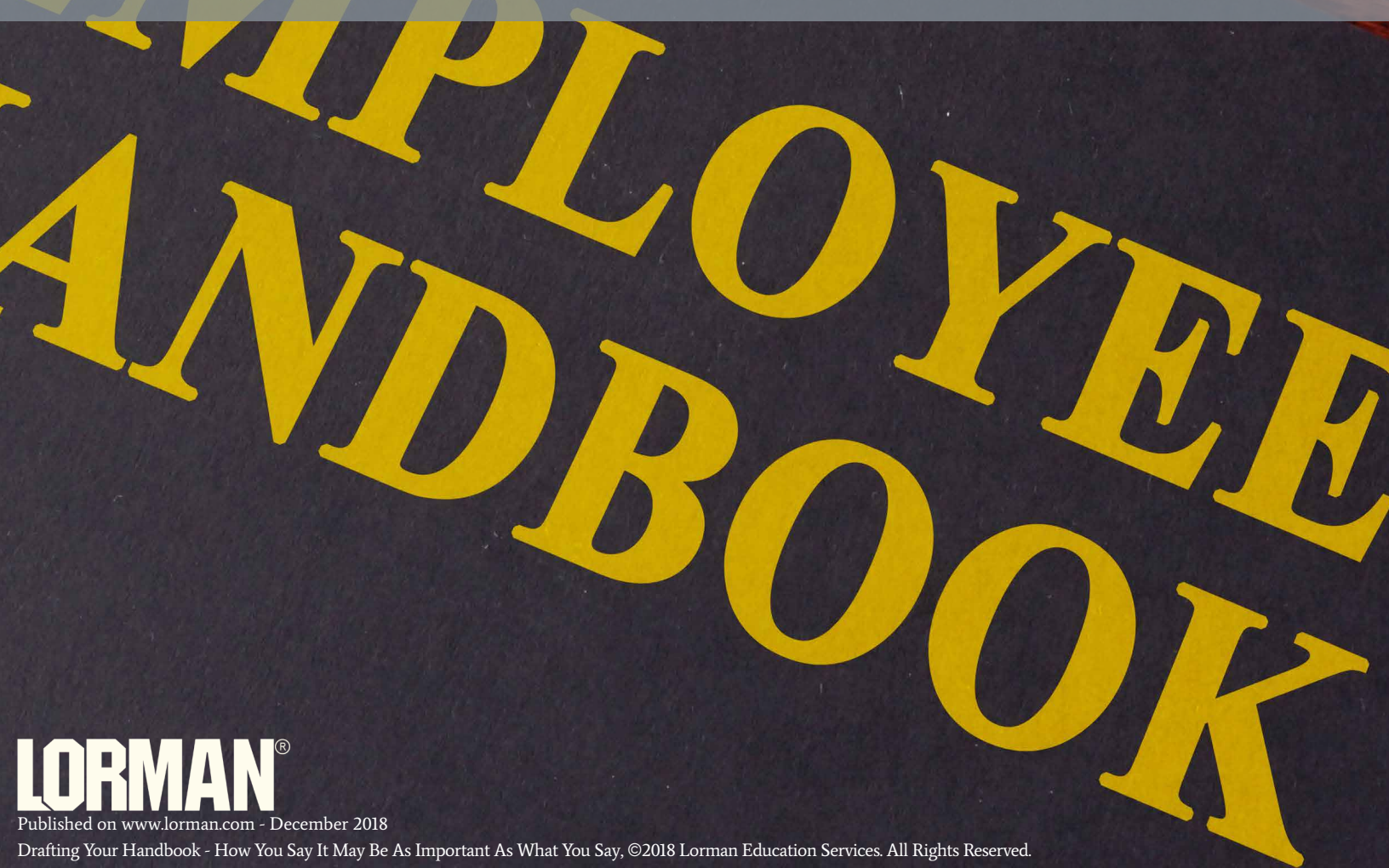

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DRAFTING YOUR HANDBOOK: HOW YOU SAY IT MAY BE AS IMPORTANT AS WHAT YOU SAY.

Employee handbook language should be simple, direct and clear. Employers often find it easier to accomplish this by referring to employees in the second person throughout the handbook (*i.e.,* "you," instead of "the employee"). This also is a simpler way to draft gender-neutral language.

For legal reasons, and to preserve flexibility, it is essential to avoid any type of promissory language, unless the employer does in fact intend to treat the statement as a legally enforceable commitment. Here are some common examples of promissory language to avoid:

Avoid these and similar words, when discussing potential employer actions or employee benefits:

- "will"
- "shall"
- "committed"
- "ensure"
- "guarantee"
- "must"

Avoid these and similar words, when discussing what the employee may expect from the employer:

- "has the right"
- "will receive"
- "is entitled to"
- "is assured"
- "can rely on"

When describing employer actions or options, it is safer to (1) keep the handbook's statements fairly general, and (2) frame the handbook to address only what the employer "may" do, or what it "generally" does, instead of providing more specific guidance about the employer's options.

Some handbooks include provisions describing how the employer will make an important decision, such as deciding on the amount of the employee's compensation. These provisions run the risk of being held enforceable against the employer as promises of specific treatment in specific situations. To minimize such risks, the provision should be phrased in illustrative terms, not exclusive ones (*e.g.,* "we consider factors such as _____"). It also should specify that the employer has sole and complete discretion to make the decision, based on the listed factors or any other lawful factors.

Finally, be aware of the mindset that's reflected in your language. For example, many handbooks are replete with statements that the employer "reserves the right" to do something, when the truth is that the employer has the right to do it. Similarly, it is unhelpful to speak of "cause" or "grounds" for the discipline or termination of an at-will employee. Neither cause nor grounds are required for such actions, and your handbook's language should not suggest otherwise.

SPECIFIC CONTENTS OF THE EMPLOYEE HANDBOOK

A. ESSENTIAL PROVISIONS

In general, if you have an employee handbook, it should include at least the policies listed in the applicable sections below. If you do not have an employee handbook, then the information contained in these "essential" policies should be made available to employees by other written communications.

Please note that the list below of "essential" policy provisions may be longer or shorter for certain types of employers. For example, retail or service sector employers often include sections outlining their expectations concerning customer service and interactions that are unnecessary in a manufacturing environment. Conversely, certain types of employers—such as unionized or public sector employers—may not be free to implement a policy of "employment at will."

1. All Employers

a) Employment-at-will language and acknowledgments

Conspicuous employment-at-will language helps the employer take advantage of the general presumption that an employment relationship is "at the will" of both the employer and the employee. "Employment at will" means that both the employer and the employee are free to terminate their relationship at any time, without needing to provide advance notice or to show "cause" for termination.

To make "at will" language conspicuous and maximize its chances of being enforced, this language usually appears on a stand-alone page as the first substantive information in the handbook. This initial at-will disclaimer should include a number of clear statements:

- The employer follows a policy of employment at will, which means that either the employer or employee is free to terminate the employment relationship at any time, for any reason.
- The employee handbook is not a contract with the employee.
- The employer has the discretion and flexibility to modify any part of the handbook, or to make exceptions in particular cases, as the employer deems appropriate.

Provisions like these minimize the risk that the employee handbook will be interpreted as an employment contract with the employee that may be terminated only for "cause," or as an enforceable promise of specific treatment in some specific situation. If an employee handbook is subject to either of these interpretations, then the employer will not be free to end the employment relationship "at will."

An employer is not automatically protected against wrongful discharge claims merely because it has adopted at-will language in its handbook or other employment documents. At-will language will not necessarily prevent an employer from being required to honor promises that individual employees allege they received. Examples are allegations that a manager promised job security during the hiring process, or that a supervisor promised a pay raise, bonus or promotion. Supervisors and managers should be trained to avoid making statements that employees might construe as enforceable promises. Further, to prevent allegations that an individual promise undermines an employee's at-will status, the employer may wish to include two additional elements in its initial handbook disclaimer:

1. a statement that only certain key executives (identified by title) have the authority to change or make exceptions to the employer's policy of employment at will, and

2. a requirement that any changes or exceptions to at-will status must be in writing and must be signed by one of these identified key executives.

These additional provisions can help the employer avoid claims that an employee justifiably relied on a supervisor's alleged oral promises of job security. Most importantly, however, the employer must follow its disclaimer in practice. If an employer makes promises that contradict the disclaimer, there is a substantial risk that a court will ignore the disclaimer.

b) Employee acknowledgment form

Employee acknowledgement forms go hand-in-hand with at-will disclaimers because, to be effective, the employer's at-will disclaimers must be communicated to its employees. Moreover, in defending against employment claims, an employer may need proof that the contents of its handbook were communicated to the employee. A properly drafted and routinely used employee acknowledgement form will serve both purposes. The employer should establish routines that require each employee to sign and return an acknowledgement form when he or she first receives the employee handbook. Thereafter, whenever the employer distributes any handbook revisions, it should obtain new employee signatures on updated acknowledgement forms.

In most states, employee acknowledgement forms can be short and simple. At a minimum, by signing the form the employee should be acknowledging that he or she:

- Has received a specifically identified version of the employer's employee handbook (*e.g.,* "I have received the ABC Company's Employee Handbook dated February 1, 2009");
- Understands that the employee handbook does not constitute a contract of employment;
- Understands that the employer has the discretion to interpret, modify or make exceptions to the handbook; and
- Understands that the employment relationship is "at will," which means that both the employee and the employer remain free to end their relationship at any time, for any reason.

The acknowledgement form should not require the employee to "agree" to these things, because such forms are not meant to be contracts of employment. The form simply summarizes some key terms of the employment relationship and documents the fact that the employee was informed of and understands those terms.

Sometimes an acknowledgement form will recite that the employee already has read the handbook. Normally, however, this will not be true when the employee signs the acknowledgement form. A better approach is to omit any "I have read" language and to instead use statements by which the employee acknowledges that the handbook "contains important information about employment with ABC Company," and that the employee is responsible for becoming familiar with the handbook's contents.

c) Equal employment opportunity and non-discrimination

An EEO section is such a common and fundamental handbook provision that failing to include this concept could raise questions about the employer's commitment to complying with anti-discrimination laws. The EEO policy also serves as the conceptual foundation for the anti-harassment policy, which in turn is an essential handbook provision because it is a crucial element of the employer's defense to a claim of unlawful harassment.

Every employer should have a non-discrimination policy that informs all employees of the following points:

- Discrimination is unlawful and violates the employer's policies.
- The employer will not base employment decisions or any terms or conditions of employment on any race, color, sex, sexual orientation, marital status, religion, national origin, disability, age of 40 or older, veteran's or military status, or any other legally protected trait or activity.
- The employer's policy against discrimination applies to all employees, including managers.
- Anyone who experiences or witness conduct they believe may be discriminatory should promptly use the employer's complaint procedure to report the matter.

In drafting it EEO policy, an employer should resist the temptation to say too much. The laws against employment discrimination prohibit employers from basing employment decisions on protected traits or activity, such as race or filing an EEOC charge, but they do not mandate that all employment decisions be either "fair" or based solely on "merit." While most employers aspire to make only far and merit-based employment decisions, it is wise to avoid handbook language that could be construed as promising this, thus binding the employer to a higher standard of conduct than the law imposes.

d) Anti-harassment policy and complaint procedure

A strong anti-harassment policy is essential because it helps the employer show that it exercised reasonable care to provide a harassment-free workplace. Under federal law, an employer may avoid liability for unlawful harassment if it can prove these two elements of the "*Faragher/Ellerth*"[1] affirmative defense:

1. The employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

2. The employee unreasonable failed to take advantage of any preventive or corrective opportunities the employer provided, or to otherwise avoid harm.

This potential defense makes it very important to publish a strong policy against harassment, including an effective complaint procedure, and to promptly investigate any harassment complaints that are made.

The anti-harassment policy should give employees at least the following information:

- An explanation of what constitutes unlawful harassment, including examples of the types of conduct that might be considered harassment. Sexual harassment should be specifically addressed, because it is one of the most common forms of harassment, but the policy should prohibit harassment on the basis on any legally protected trait or activity.
- The employer prohibits all forms of unlawful harassment, whether based on sex or on any other legally protected trait or activity.
- To foster a workplace where everyone is treated with dignity and respect, the employer's anti-harassment policy prohibits offensive conduct, even though the conduct may not yet have sunk to the level of unlawfulness.
- If the employer finds that prohibited harassment has occurred, it will take prompt and effective corrective action, possibly including termination of employment.
- Anyone who experiences or witnesses conduct that may be harassment should promptly use the employer's complaint procedure to report the situation.
- The employer prohibits retaliation against anyone who reports possible harassment or who provides information during the employer's investigation of a harassment complaint. Retaliation will not be tolerated, and any concerns about retaliation should be addressed using the employer's complaint procedure.

The employer's **complaint procedure** for concerns about discrimination, harassment or retaliation may be part of the anti-harassment policy or be a stand-alone policy. It should be designed to serve as an accessible and effective vehicle for raising concerns about possible discrimination, harassment or retaliation. The complaint procedure should inform employees of at least the following:

- The employee has a number of specific alternatives for raising concerns or complaints about possible discrimination or harassment. The complaint procedure should identify who can receive such complaints, by job title.
- The employer will promptly investigate all complaints of possible discrimination, harassment or retaliation.

1. Named after the U.S. Supreme Court cases known as Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998).

- The employer will protect the confidentiality of such complaints to the extent possible. (The employer should ***not*** promise complete confidentiality. The most an employer can honestly say is that the complaint will be treated "as confidentially as possible, consistent with the needs to investigate and address it.")
- The employer will take prompt and effective action to end any prohibited harassment it finds has occurred.

In developing or reviewing its anti-harassment policy and complaint procedure, the employer should carefully consider what specific approaches are most likely to be effective for its particular workforce. These policies will not prevent an employer from being held liable unless they are designed to be effective in practice.

A key decision in formulating an anti-harassment complaint procedure involves the scope of the reporting mechanism. Here are some important considerations for an employer, in framing its complaint procedure:

- It is essential that the employee be allowed to "by-pass" the alleged harasser and take the harassment complaint to someone else. For example, an employee should not be required to first make the harassment complaint to his or her immediate supervisor, because the employee may be accusing the immediate supervisor of perpetrating or condoning the offensive conduct.
- For similar reasons, it's best to provide at least some complaint avenues that are outside the employee's chain of command. Persons higher in the same chain of command may be viewed by an employee as biased in favor of the accused harasser, which can lead to arguments that the harassment complaint procedure was ineffective.
- A similar "by-pass" problem can exist with human resources or employee relations staff. For example, if the organization assigns particular HR representatives to service specific departments, then the assigned HR representative may have been personally involved in some of the events leading to the harassment claim. Requiring the employee to raise the complaint through either the assigned HR representative or to the immediate supervisor again leaves the employer vulnerable to arguments that its complaint procedure was ineffective for the particular situation.
- While the points just made counsel in favor of a broad scope for the reporting procedure, there are both risks and benefits associated with the broadest reporting alternative, under which employees may bring harassment complaints to "any manager." The benefit of this provision is that it increases the chances that the employees will actually report their concerns to someone, hopefully enabling the employer to address such concerns before liability attaches. At that same time, however, a very broad reporting procedure may increase the risk that the employer will be found to have "dropped the ball." For example, employees sometimes contend that they told a lower level manager about a situation they believed was harassment, yet it turns out that the manager did not perceive the employee to be raising such a concern, so did nothing to investigate or follow up.

When designing your complaint procedure for concerns about discrimination, retaliation and harassment, bear in mind that there is no "one size fits all" procedure. Rather, it boils down to making judgments about what is likely to be most effective for your particular workforce. For example, the needs of the field employees may be different from the needs of employees at the company's headquarters. The latter presumably have more contact and comfort with the Human Resources organization, who they encounter personally in the workplace, than do employees who are spread across the country making sales, and who rarely meet the HR staff. Further, time zone differences may limit the opportunities of field employees to contact headquarters staff, counseling in favor of a toll-free "hotline," where they may leave a message to initiate a complaint.

e) Language limiting the handbook's coverage to "employees" of the organization

Non-employees, such as independent contractors or workers who are engaged through a temporary help firm, sometimes claim that they are entitled to benefits described in the employee handbook. While some benefits described in the employee handbook are created through formal benefit plans that contain provisions excluding non-employees, in other cases, the employee handbook is the only writing describing a voluntarily employer benefit (such as paid leave). In either case, to avoid benefits claims, the handbooks' introduction should include language specifying that it applies only to persons who are direct employees of the organization and not to any person who provides services for the employer as either an independent contractor or an agency temporary—even if such persons are later recognized as having employment relationships with the organization.

f) Expectations about attendance and reporting absences

Policies about attendance and reporting absences are not essential in the strictest sense, but they can be very helpful to an employer as a practical matter. The policy should clearly communicate the employer's need for regular and reliable attendance as well as information about expected work hours and the employee's responsibility for reporting absences. Such provisions place the employer in a stronger starting position when a disability accommodation issue arises about an employee's poor attendance. They also assist the employer in preventing abuse of the rights provided under other protected leave laws such as paid sick leave or other forms of paid time off (such as vacation or personal holidays) to care for their spouse, parent, parent-in-law, or grandparent when one of these family members has s serious health condition. Such laws typically require the employee to comply with the terms of any employer policy applicable to the leave.

"No-fault" attendance policies were popular for a time, but they have become problematic with the proliferation of leave laws at the federal and state levels. Typically, under a no-fault attendance policy, an employee is subject to progressive discipline after a certain number of absences, regardless of the reason for the absence. These policies rely for their effectiveness on being able to count absences toward the tolerance levels established in the policy; the policy's threat of discipline for exceeding those levels has a chilling effect on excessive absenteeism. However, to avoid violating federal or local leave law rights, a no-fault attendance policy cannot count any absences permitted under these laws. As leave laws have expanded, the number of exceptions needed in a no-fault attendance policy seriously limits such a policy's effectiveness, as a practical matter. Presently—and at a minimum--- employers would need to include exceptions for absences protected under applicable federal, state and local laws such as the federal Family and Medical Leave Act, the Americans with Disabilities Act, the Uniformed Services Employment and Reemployment Rights Act, New York Paid Family Leave.

Expectations about work hours and the hours covered by employees' salaries

Policies about work hours again are not essential in the strictest sense, but they can be of practical assistance to an employer in certain areas of wage-hour law compliance. Such policies may help the employer minimize overtime law compliance issues, and may help limit overtime liability to exempt employees who have been misclassified and qualify for back overtime pay.

The employer's policy about work hours should address the employer's basic expectations, but it should not suggest that the hours mentioned are the only times when the employee may be required to work. Rather, the employer should make it clear that all employees (both exempt and non-exempt) may be required to work more than the normally expected hours when the employer's business needs require this.

If the employer pays salaries, rather than an hour rate, it also should consider specifying that the employee's salary constitutes the employee's full straight-time compensation for all hours worked in each workweek, even though the employee's actual work hours may vary from one week to the next, either

above or below the generally expected hours. Such language may give the employer a basis for using the "fluctuating workweek" method of overtime pay computation in a misclassification case, which substantially limits overtime liability. This is because, when the fluctuating workweek method applies, the employer is viewed as having already paid the employee for the straighttime portion of all overtime hours, so the employer will fully satisfy its overtime premium obligation by paying each non-exempt employee an additional half-time for each overtime hour worked. (There are additional requirements for using the fluctuating workweek approach, which are described in the text of the U.S. Department of Labor regulation on the subject, however, counsel should be consulted and case law reviewed.)

g) Overtime eligibility and pay

Provisions that inform employees of the basic rules about overtime eligibility and overtime pay are essential in a practical sense as they may help prevent wage-hour liability. It is highly advisable for the employee handbook to include:

- Basic information about the "exempt" and "non-exempt" classifications of employees and the significance of these classifications (*i.e.,* employees should know that these classifications indicate whether or not an employee is eligible for overtime pay).
- Information about who employees should contact if they have any question about whether they are exempt or non-exempt, or if they think their overtime classification is incorrect.
- A statement that non-exempt employees will receive overtime pay equal to time and one-half of the employee's regular rate of pay for all time worked beyond 40 hours in a workweek. (Employers with a different overtime rate should determine whether any applicable state laws require payment of "daily overtime"—that is, overtime for working more than a certain number of hours per day—or whether there are local provisions for higher overtime premiums than time and one-half in certain situations.)

In addition, the employer should consider including a definition of the "workweek" it will use for purposes of overtime pay computations, as the employer is required by federal and state law to define this somewhere. Since most employers use the same workweek for all employees, the employee handbook is a good place to meet the employer's obligation to define its workweek.

Many employee handbooks include a statement in the overtime section requiring nonexempt employees to get permission before performing any overtime work, and stating that an employee is subject to discipline if he or she works overtime in violation of this rule. Employers must understand that these statements are acceptable only as long as they are properly administered. Supervisors and managers must be trained that they cannot deny payment to employees who have worked unauthorized overtime. Disciplinary action is the employer's only recourse in this situation; the employee must be paid for the unauthorized overtime work if the employer knew or should have known that it was being performed.

h) Meal and rest periods

At a minimum, the handbook should inform non-exempt employees that meal and rest periods will be granted in accordance with any applicable state law. It also should direct non-exempt employees to appropriate internal resources for more information about their own group's or area's practices.

i) Timekeeping and pay practices

Describing the employer's timekeeping procedures and pay practices is a further way of fostering compliance with wage-hour laws. Claims of "off the clock" work are among the most common wage-hour claims. Cases like these have become the darlings of plaintiffs' attorneys, who seek to base class actions upon them.

To minimize the risk of liability for off-the-clock work, employers should consider including the following elements in a timekeeping policy:

- The employee is responsible for filling out his or her own time record.
- The employee must accurately report **all** hours of work.
- The employee is accountable for the accuracy of his or her own time records, and is subject to corrective action or termination for either over- or underreporting time worked.
- No supervisor or manager has the authority to make an employee under-report the employee's work time. Any supervisor or manager who tries to do this is subject to corrective action or termination.

The policy should also encourage employees to review their paystubs upon receipt and to promptly report any errors so that the employer may correct them.

With respect to exempt employees, the 2004 changes to the federal salary basis regulation created an incentive for employers to adopt a "safe harbor" policy to minimize the risk of inadvertent improper deductions destroying the "salary basis" compliance needed to preserve the overtime exemption. This makes it advisable to inform exempt employees in the handbook that, for any work week in which they perform any work, there will be no salary deductions for any of the following reasons:

- Partial day absences for personal reasons, or for sickness, vacation or disability (unless the absence is covered by Family and Medical Leave);
- The employee's absence on a scheduled work day due to a decision by the employer to close its operations;
- Absences for jury duty, attendance as a witness, or military leave in any week in which you have performed any work; or
- Any other deductions prohibited by state or federal law.

Here again, employees should be encouraged to report any improper deductions so that the employer may correct them.

j) Paid time off benefits voluntarily provided by the employer (*e.g.,* personal time off, or vacation and sick leave)

Typically employers are not legally required to offer any paid time off benefits. However, most organizations voluntarily offer their employees some sort of paid leave benefits, such as vacation and sick leave, or a multi-purpose paid leave benefit often known as "personal leave or PTO (personal time off). If the employer chooses to offer such paid leave benefits, its handbook should specifically describe which employees are eligible for each form of paid time off, and how the employee "earns" the benefit. This is an exception to the general rule that specificity should be avoided in an employee handbook, at least when it comes to statements about what the employer will do for the employee.

Being specific about the terms and conditions of the employer's paid leave benefits is important, because the employer's paid time off benefits typically are viewed as an implied part of the compensation agreement between the employer and employee, and the employee handbook usually is the principal source of information about the terms and conditions of this implied agreement. Thus, it assists the employer to inform employees in writing of any limitations on their entitlements to paid leave. Doing this provides evidence that the employee impliedly agreed to those limitations.

An employer's paid leave policy also should address whether the employee's PTO or vacation and sick leave have any cash value to the employee upon termination. Most employers choose to pay terminating employees for any unused PTO or vacation they have left when they terminate, but New York law, for example, does not necessarily require this. Rather, a New York employer may specify that unused PTO or

vacation benefits expire upon termination—as long as the employer clearly communicates this to its employees in advance, such that the employees may be considered to have accepted that condition. (However, multi-state employers must remember that certain other states prohibit policies that would require a terminating employee to "forfeit" the employee's paid leave benefits.)

2. Employers with 50 or More Employees

Employers who have at least 50 employees are covered by the federal Family and Medical Leave Act Leave ("FMLA"). The FMLA regulations specify that:

(3) If an FMLA-covered employer has any eligible employees, it shall also **provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.** In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the notice contained in Appendix C of this part or may use another format **so long as the information provided includes, at a minimum, all of the information contained in that notice.** Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at www.wagehour.dol.gov. Employers furnishing FMLA notices to sensory-impaired individuals must

also comply with all applicable requirements under Federal or State law. 29 C.F.R. § 825.300(a)(3)-(4) (emphasis added). Thus, employers now are required to have an FMLA policy, if they have any covered employees. Most such employers probably already have such a policy, but they must review that FMLA policy to assure that it contains all of the required elements in the Department of Labor's prototype policy. In addition, New York employers must comply with the Paid Family Leave Act ("PFL"), but if the employer wants FMLA to run concurrently with PFL, they must understand how to navigate the notice.

3. Employers with Federal Contracts of Grants

Organizations that do business or receive funds from the federal may be subject to a host of government requirements, which are too numerous and specialized in nature to discuss here. Such organizations should investigate what requirements apply to their own operations, and establish mechanisms that will enable them to comply.

For employee handbook purposes, two topics are especially important to government contractors or grantees: (1) the need for a Drug-Free Workplace Act policy, and (2) the need for government contractors to have stricter timekeeping policies than other employers.

a) Drug-Free Workplace Act

The federal Drug-Free Workplace Act ("DFWPA") applies to all organizations that receive federal grants, and to those organizations that have federal contracts exceeding $100,000. The DFWPA imposes several obligations on the organizations it covers. Such employers must:

- Publish and distribute a drug-free workplace policy to all employees who are working on the covered contract or grant.
- Establish a drug-free awareness program to make employees aware of the dangers of workplace drug abuse, the employer's policy against it, the penalties that the employer may impose for drug abuse violations, and any available drug counseling, rehabilitation or employee assistance programs.
- Notify covered employees that, as a condition of employment on a federal contract or grant, the employee must (1) abide by the employer's drug-free workplace policy, and (2) notify the

- employer within five calendar days if the employee is convicted of a criminal drug violation for an offense that occurred in the workplace.
- Notify the appropriate federal contact in writing of any workplace criminal drug convictions the employer learns of, within 10 calendar days of when the employer receives notice of such a conviction.
- Establish employment consequences for employees who are convicted of a reportable workplace drug offense (*e.g.*, disciplinary penalties, up to and including possible termination, or satisfactory participation in rehabilitation).

A good drug-free workplace policy for a federal grantee or a covered federal contractor should address all of these topics.[2]

b) Timekeeping

Special timekeeping rules apply to federal government contractors. For example, it is important that government contract employees record all time worked completely and accurately, regardless of whether the time is billable to the federal government. Proper time charging practices must be used; employees must complete their own time records; and altering or falsifying such records is prohibited. A government contractor's employee handbook or policies should communicate the rules that apply to its workforce, and the possible consequences for violations (*e.g.*, possible criminal liability for the employee; possible debarment of the employer from federal government contracting).

B. SOME OTHER COMMON HANDBOOK PROVISIONS

1. Employee Classifications

This is typically used as a definitional provision, to distinguish regular employees from directly-employed temporaries; part-time employees from full-time employees; and exempt employees from non-exempt employees. The employer's operations or workforce may call for different or additional employee classifications, such as seasonal employees.

If employee classifications are defined in the handbook, then the rest of the handbook should be reviewed to make sure that the defined terms are used consistently and accurately.

2. Special-Purpose Paid Leave Benefits

In addition to PTO or vacation and sick leave, most employers voluntarily choose to offer a variety of special-purpose leave benefits that are either fully or partially paid. Examples include:

- Holiday
- Floating Holidays
- Bereavement Leave
- Paid Military Leave[3]
- Paid Jury Duty and/or Witness Leave4

If the employer chooses to offer any such benefits, it should spell out which employees are eligible for

2. Many employers voluntarily adopt drug- and/or alcohol-free workplace policies, even though they are not covered by the DFWPA. These employers have more latitude in defining the scope of their policies, and they need not address every topic in the text. In contrast, many employers who are covered by the DFWPA voluntarily include additional elements in their policies against workplace substance abuse. For example, a covered employer might also prohibit alcohol impairment in the workplace, and/or require employees to notify the employer if their job performance may be impaired by use of a prescribed drug. These policies should be designed to comply with the limitations of disability discrimination laws and any other applicable laws.

3. Regardless of whether the employer chooses to grant any paid military leave, the employer must comply with federal and state laws requiring employers to grant unpaid military leave. However, many employers choose to provide at least a limited amount of paid military leave (e.g., two workweeks per calendar year).

each of these benefits and the conditions the employer places on their granting or use. Special-purpose leave benefits typically will be considered a matter for negotiation between the employer and the employee. Thus, this is another area of the handbook where it behooves the employer to be more specific than is normally appropriate, especially in stating any rules or procedures that may impose limitations on the employee's eligibility for or use of the paid leave benefit.

Under the federal and state "salary basis" regulation, an employer may not reduce an exempt employee's pay for a partial workweek of military leave, jury duty or witness service. Employers should make sure that their leave policies and their payroll practices respect this important limitation.

3. Unpaid Leaves

The handbook's paid and unpaid leave provisions need to be considered as a whole, to test whether they fit together logically and address all of the situations that the employer wants or needs to address. A catch-all unpaid leave of absence provision is usually advisable, as this can serve as a reasonable accommodation vehicle in appropriate cases.

4. Reasonable Accommodation of Disabilities

A reasonable accommodation policy shows that the employer is aware of and intends to honor its obligations in this important area. If the employer chooses to include such a policy, it should provide basic background information about what "reasonable accommodation" of disabilities means, and it should describe what the employee should do to request a disability accommodation. (Of course, employers cannot deny a reasonable accommodation merely because the employee fails to make an accommodation request under the policy.) The policy also should provide a general description of how the employer addresses disability accommodation issues, pointing out that these are handled on a case-by-case basis through discussion with the employee and input as needed from knowledgeable health care providers. Finally, it is useful to inform employees in the policy that they are expected to cooperate with the employer in reviewing and analyzing any accommodation issues that may arise.

5. Probationary or Introductory Periods

These provisions should be avoided if the employer wants to preserve an employment-at-will relationship, because they imply that the employee has greater job security after completing the probationary or introductory period.

6. Employee Discipline and Standards of Conduct

Policies about employee discipline and standards of conduct should be drafted very carefully, if the employer chooses to adopt them, because they can easily undermine employment-at-will status. For example, if a progressive discipline policy is phrased in mandatory terms, the employer will not be free to terminate employment unless the employer has taken all of the earlier progressive steps.

Consider the following pointers when drafting or reviewing policies that address employee discipline or standards of conduct:

- The policy should use permissive, not mandatory, language. The employer must retain sole discretion to make the final decision.
- No specific procedures should be required. Procedural requirements are fuel for arguments that the employer is liable for violating its own procedures— *e.g.*, because those procedures are held to be a binding contract with the employee, or because a failure to follow the employer's own procedures implies an improper discriminatory or retaliatory motive.
- A progressive discipline policy should be phrased as a guideline from which the employer is free to deviate, in its sole discretion—including by immediate termination of the employee involved.

- Any standards of conduct or lists of offenses that may result in discipline or discharge should be phrased as examples, not as complete lists. The employer must remain free to discipline or discharge employees for conduct that is not listed in the policy.

7. Termination of Employment

Like policies that address discipline and standards of conduct, a termination policy should be drafted so as not to limit the employer's flexibility to terminate an employee "at will," without prior notice or cause.

In many handbooks, the "Termination" policy just defines different types of termination—*e.g.*, resignation, discharge or layoff. This is the safest approach, as long as these definitions do not attempt to define **all** of the situations in which the employer may made an involuntary termination decision, nor suggest that all involuntary termination decisions must fall into one, and only one, of the policy's defined categories. (For example, when an employer is confronted with the need to reduce staff for economic reasons, the employer often selects employees who are close to being discharged for performance deficiencies. The employer's "layoff" definition should not deprive it of the argument that it would have terminated the employment relationship for performance reasons, even if it hadn't been facing economic constraints.)

A termination policy should **not** require an employee to give a minimum period of notice before resigning, because such a requirement if fundamentally inconsistent with the concept of employment at will. For the same reason, an employer should not promise any minimum of notice before involuntary termination.

Occasionally, an at-will employer will decide to provide a severance pay benefit in cases of involuntary termination. However, most at-will employers do not provide such a benefit. This increases their flexibility to negotiate an individual severance arrangement with a terminating employee, in exchange for the employee releasing any potential employment law claims against the employer.[5]

8. Performance Evaluations

Performance evaluation policies are another area where the employer must be careful to avoid language that might jeopardize employment-at-will status. The principal pitfall is attempting to detail all of the criteria that will be used in the employer's evaluations of each employee's performance. Such a list could be construed as a promise of specific treatment in specific situations, which would transform the employment relationship into one that is terminable only for cause. Moreover, an employee handbook typically is too general in nature to accurately and effectively communicate performance evaluation criteria for each employee. This communication should be left to more individualized settings, such as goalsetting discussions between employees and their managers.

The employee handbook is an appropriate place to provide a general description of the employer's performance evaluation process, if the employer has a regular process. Here, again, only a general overview is appropriate; too much specificity may later be construed as having created a binding promise that the employer would follow a particular process in all instances. For example, performance evaluation policies typically say how frequently the employer conducts evaluations. This should be drafted so as to preserve the employer's flexibility to evaluate employees more or less frequently than the normal timing.

A performance evaluation policy should not imply that the employee must wait until the formal evaluation cycle to obtain performance feedback, nor should it imply that supervisors and managers bear the sole responsibility for initiating such feedback discussions. Rather, the policy should encourage two-way communication throughout the evaluation cycle. Employees should know that they are free to request informal performance feedback at any time.

9. Personnel Files

5. If the employer wants to obtain an enforceable release of claims from a terminating employee, the employer must offer the employee additional "consideration"—i.e., valuable commitments that the employee was not otherwise entitled to receive.

If the employer chooses to include a personnel file policy in its employee handbook, this policy should be very simple. Under New York law, an employer is not required to provide access or a copy of the file to an employee, but the employer may choose to do so, or at the very least provide a copy of everything the employee signed. Alternatively, a policy may indicate that the employer treats its personnel files as confidential, but it should avoid language that could be construed as promising complete confidentiality. In addition, the employer may wish to state that personnel files are the property of the organization, not the employee.

A personnel file policy is also a good place to remind employees to keep the employer apprised of any changes in their relevant personal information (*e.g.*, name, SSN, home address, emergency contact, dependents or beneficiaries (for benefits and federal tax withholding)).

10. Outside Employment or Work

The principal reasons that some employers choose to adopt a policy about outside employment or work are (1) to prevent conflicts of interest or breaches of confidentiality, and (2) to ensure that outside work activities do not limit the employee's availability to meet the employer's needs. Thus, such policies generally require the employee to notify the employer if he or she is considering engaging in any outside employment or work, and to obtain the employer's advance written approval.6 This enables the employer to evaluate potential conflicts of interest or confidentiality concerns on a case-by-case basis. The policy also may state that, even if the employer approves the outside activity, that activity must not interfere with the employee's availability to meet job requirements. Finally, most employers will want to state that any activities related to an approved outside activity must be conducted offsite and not during the employee's scheduled work hours for the employer.

11. Employee Benefits

For benefits that are regulated by statutes such as ERISA, it is best to avoid summarizing the benefits in the handbook, to avoid creating conflicts with the plan documents. The safest approach is to just list the benefits without describing them and to refer the employee to the relevant summary plan description and/or the other plan documents. In addition, the employer should make it clear that it has the discretion to change its benefits offering from time to time as it sees fit.

Here are some examples of the benefits that are subject to the comments above:

- Health Plan or Health Insurance
- Short-Term Disability
- Long-Term Disability
- Life Insurance
- 401(k) and/or Retirement Plan
- Employee Assistance Plan
- Flex Plan (*e.g.*, dependent care or unreimbursed health care expenses)
- Stock Option Plan
- Employee Stock Purchase Plan

12. Electronic Communications

It is advisable to inform employees that the employer's electronic communication resources are the employer's property; that any communications made through them should not be considered private; and that the employer may monitor, access, read, use, alter, delete and disclose any such communications.

Many employers also use their electronic communication policies to set forth rules about the use of the

6. As a companion to such a policy, the employer should inquire about other jobs or work activities during its hiring process, to eliminate the possibility that a new employee will already have a second job when hired.

employer's electronic communications resources. Examples are rules about:

- Using these resources principally for the employer's business.
- Maintaining a business-like tone in all emails.
- Protecting the organization's confidential information when using electronic communications.
- Retaining electronic information that belongs in the organization's business records.
- Maintaining electronic security (*e.g.*, using and changing passwords).
- Refraining from accessing inappropriate Internet sites.
- Respecting the copyrights and intellectual property rights of others.

13. Solicitation and Distribution; Bulletin Boards

It is useful to include policies on these topics in the employee handbook, so as to establish workplace communication rules in advance of any union organizing activity. If rules about these topics are developed only after the employer learns of union organizing activity, then the employer is vulnerable to arguments that it adopted the rules in order to squelch the organizing drive.

In drafting such policies, employers must remember that they may not discriminate against union-oriented messages. All solicitations of a personal nature should be treated the same—e.g., employees who solicit their co-workers to buy Girl Scout cookies should not be treated better than employees who solicit their co-workers to join a union. The employer can prohibit non-employees from engaging in solicitation and distribution activities on its premises, and it can prohibit employees from soliciting their co-workers during either employee's working time. However, the employer cannot prohibit employees from engaging in union-oriented solicitation during the non-working time of all employees involved, even if this happens to occur in a working area.

14. Office or Facility Closings (Inclement Weather, etc.)

Inclement weather, natural disasters and other emergencies may create confusion throughout the workforce about whether or not employees should come to work that day and, if not, how the absence will be treated. As office or facility closure policy can help to minimize this confusion. The policy should address:

- **Closure Procedures and Communications:** Who has the authority to close the facility, and how do employees learn of the closure? Many employers provide a hotline for employees to call for facility status information. In addition, many policies inform employees that they should assume their workplace is open for business, unless they are specifically informed to the contrary.
- **Treatment of Absences:** If the employer closes the facility, will employees be paid for the day? How will the absence be treated if the facility remains open but the employee stays home that day due to personal transportation difficulties, child care responsibilities, or etc.? Many employers struggle to design rules that address these differing legal standards yet provide some rough equity between exempt and non-exempt employees. Some commonly used options include:
    - Paying all employees for the day if the employer closes the facility.
    - Allowing all employees to use any applicable paid leave benefits they have available if the facility remains open by the employee is absent for all or part of the day due to personal circumstance.
    - If the facility remains open but the employee is absent for all or part of the day and does not have enough paid leave to cover the absence:

- For non-exempt employees, charge the balance of the absence to leave without pay.
- For exempt employees, pay the employee for the full day.[7]

New York currently has a law affecting this policy, and pending regulations.

15. Safety and Health

This topic does not necessarily need to be addressed in the employee handbook. However, employers must have a written accident prevention plan that is tailored to the employer's circumstances and describes its total safety program. The accident prevention program usually is separate from the employee handbook, due to its level of detail and specialized nature. Important topics to address in the employer's safety program include its first aid plan, safety committee, safety orientation, emergency action plan, hazard analysis, and any chemical hazards.

The employee handbook can be used to highlight the most important and most generally applicable elements of the employer's safety program, and to cross-reference the employer's other sources of guidance about workplace safety and health. It also is a good place to remind employees of the need to report any illness or injury arising from employment, no matter how slight, and to encourage them to immediately report any unsafe conditions or equipment needing repair.

16. "Open Door" Policy

Voluntary "open door" procedures can be helpful in maintaining positive employee relations, and in preventing minor concerns from blossoming into full-fledged employment claims. Generally, however, an "open door" procedure is somewhat hierarchical in its design. Often, an open-door procedure does not give the employee any real opportunity to "by pass" an alleged harasser who happens to be in the employee's chain of command.

Because of this, if the employer chooses to have an open-door policy, it should address the relationship between this policy and its anti-harassment complaint procedure. Employees should not be required to initially raise discrimination or harassment concerns through the open-door policy, but they should be permitted to do so if they wish.

7. This ore generous treatment of exempt employees is necessary to preserve the salary basis of payment, as is essential if the employer wants to preserve the overtime exemption. Under the federal and state salary basis regulations, an employer may not dock an exempt employee's pay for partial day absences.