



# Sword or Shield? Using Employee Handbooks

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*With the incoming new year just around the corner, many employers will be "rolling out" new or revised policies and employee handbooks. For many reasons, this timing makes sense. For those considering implementing a handbook for the first time, or those who have not revised their existing handbook in several years but realize the need to do so, the following article is for your consideration.*

Do you have an employee handbook? Do you want one? Or even need one? Should you revise the one you have? How do you go about creating a good one?

While there are no magic answers to questions about employee handbooks, all employers should consider these questions carefully. This article will help you with your decision.

## **To Have or Have Not**

Is there a law requiring that you have a handbook? No. If you have a handbook, will you be in a better position to prevent or defend an employment lawsuit? Usually but not always. Then why go to the trouble?

There was a time when many management lawyers actually recommended against the use of employee handbooks, especially for their non-union clients. Times have changed, and so have the minds of most management lawyers. The biggest threat to a company today is not a group of employees joining a union but a single employee filing a lawsuit. Compliance with federal laws requires notifying your employees that you support equal opportunity, prohibit harassment, and allow time off for certain reasons. Many employers, with the support of their lawyers, now believe that notification of the company's position on these and other issues should be made through a well-written handbook that preserves the employer's flexibility and does not create contracts with employees. In short, these days you really should have a handbook.

## **The Contents**

Now that you have decided to have a handbook, what should be in it? Again, there is no magic answer or formula. It's really up to you, depending on your business, the number of employees you have, and what your practices have been in the past.

There are a wide variety of subjects that are normally covered in an employee handbook including, but certainly not limited to:

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- a brief history of the company, and a welcome to the new employee
- a statement of the company's purposes or goals (Mission statement)
- an equal employment opportunity or nondiscrimination statement
- a policy on absenteeism
- safety rules
- holidays and an explanation of holiday pay
- a statement that all employment remains "at will"
- complaint handling procedures
- an overview of benefits like vacations, health, life, dental, and/or other insurance, 401(k) plans or other retirement plans
- leave of absence policies, such as sick leave, Family and Medical Leave Act (FMLA) leave, bereavement leave, personal leave, military leave, and jury duty leave (and, remember, the law requires you to have an FMLA policy in your handbook if you have a handbook)
- e-mail, voice mail, telephone and computer policies (including Internet use)
- a statement concerning the company's monitoring (electronically or otherwise) employees while they are at work
- your workplace harassment policy
- smoking, dress code and customer relations policies
- a disclaimer that the handbook is not a contract
- drugs in the workplace
- a policy on searches, such as lockers, file cabinets or desks
- policies that may be required by state law.

Again, with the exception of these few provisions required by law, what you actually include is up to you. With respect to some of the items listed above and others you may think of as well, you must also consider whether there are laws in your state that could have an impact.

## **Periodic Review**

Once your handbook has been prepared, it's important that you obtain a legal review of its contents to make sure that all laws (federal, state, and local) have been taken into account. Then, once a year - or at least once every two years - you should have another legal review to make sure that everything is still as it should be.

A legal review is not all that is necessary, however. You should review the handbook on an annual basis to make sure that it is still factually correct. Policies do change, and if you have a handbook, updates should be made as changes occur. A factually inaccurate handbook, or one that is not representative of your actual practices, can be as problematic as statements that are illegal.

## **Provisions to Avoid**

If you have a handbook, it most likely will play some part in any employment claim or lawsuit filed against you. So pay careful attention to what your handbook says or doesn't say. In this regard, there are a few handbook provisions that may create legal risks.

Generally speaking, you should avoid using language concerning long-term employment, permanent employment, uninterrupted employment, continued employment as long as a job is done satisfactorily, and the like. Why? This kind of language could imply something more than an indefinite or at-will employment situation. In other words, it could create a guarantee of employment.

If you are a non-union employer, you should reconsider the use of "probationary" periods of employment.\* This term could imply that once employees complete this period, they are entitled to a more definite period of employment. Rather than calling the first 30, 60, or 90 days of employment the "probationary period," you might refer to this time as the "introductory period" during which an employee learns about the job and receives closer supervision, and during which all benefits of regular or full time employment may not be available.

You should also avoid stating that employees will be terminated or discharged only "for cause." While an employee is rarely terminated for no reason at all, the use of terms such as "cause," "good cause," or "just cause" have special significance in the law and may mean that you cannot terminate an employee except for a serious reason or even misconduct.

If you want to include a statement of the company's policy concerning unions, be careful in wording any receipt or acknowledgment of the handbook. The National Labor Relations Board takes the position that it is a violation of the law to include a non-union statement in a handbook and then make employees sign a pledge to abide by and follow all the rules contained in the handbook.

## **Procedures and Promises**

You should also pay close attention to language concerning any procedure specified in a handbook, especially procedures that relate to complaints, discipline, terminations, promotions, layoffs, salary increases, job relocation, and severance pay. All procedures concerning these subjects should be carefully worded. You should think through what the procedures require. anticipate potential

problems, and make changes in the problem areas. If a procedure exists, it needs to be followed since the failure to do so will give an employee a basis for claiming "breach of contract" or "wrongful discharge." Adherence to the procedure will go a long way toward heading off such a claim or lawsuit.

You also should be very much aware of all promises or guarantees you make in a handbook. Don't make promises you are not prepared to keep. Promises made in an employee handbook may very well be enforced by a court.

When it comes to spelling out the details of a progressive discipline system in an employee handbook, don't do it. If you say that certain things will be done before a discharge (for example, the employee will be given an oral or written warning), you may be accused of violating the contract created by this procedure if you terminate an employee before going through all steps of the progressive discipline system. Policies of this type are fertile ground for wrongful discharge claims.

If you include a progressive discipline policy in your handbook, make sure your employees know these are "guidelines" only, and always include a provision making it clear that you can, in your discretion, skip any and all steps in the progressive discipline system or decide not to use the progressive discipline system at all when an employee is discharged (Of course, if you are a union employer and have a collective bargaining agreement, this option isn't available).

Similarly, if you have a "grievance" or complaint handling procedure in your handbook, be sure to make it clear that this procedure applies only to problems that arise while the employee is working for you. If that's not made clear, an employee may try to pursue the grievance procedure after being fired. Obviously, that could give an employee what amounts to two bites at the apple while limiting your right to fire him as quickly as you would like.

### **Procedural Issues**

When employees are given a handbook, they should sign a statement acknowledging its receipt, and that receipt should be maintained in their personnel file. That way, there's no question about whether it was received. Most courts will presume that if an employee has been given a handbook, the employee is on notice of its contents.

Similarly, employees should sign a statement acknowledging receipt of any changes in the handbook during the course of employment.

Finally, clearly state in the handbook that it is not a contract -- that it is, rather, a set of general guidelines and procedures to assist the employee in performing his or her job, and that you reserve the right to change or delete those guidelines, policies, and procedures.

### **The Bottom Line**

No system is perfect and no handbook is either. A well-written and carefully-considered employee handbook should help you avoid a lot of problems.

\*Except where dictated by state law.

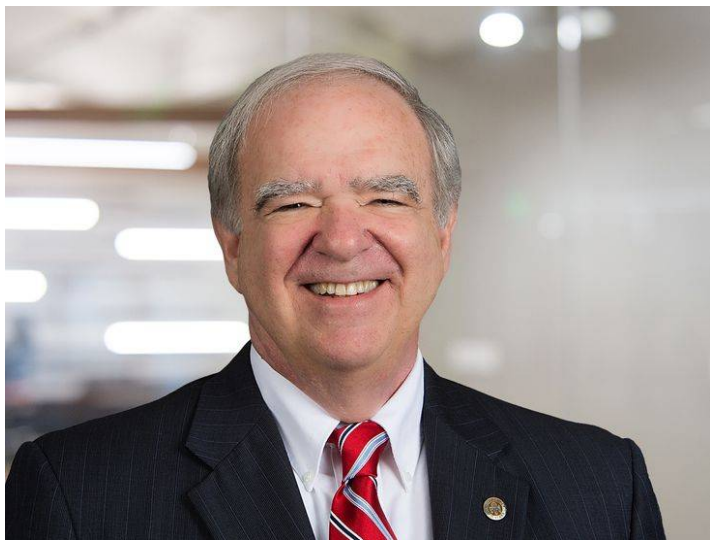
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