

Employee Handbooks

Sarah Ewing
Sather, Byerly, & Holloway

What can you cover in an employee handbook?

Overview

- Handbook Basics
- NLRB §7 protected and concerted activity
 - Social Media Policies
 - Confidentiality
 - Employee Conduct
- Alcohol and Drug Policies
- Oregon Sick Leave and Return to Work Policies

Introduction

- No two handbooks are the same
- Project is *never* a small one
- Consider the medium (e.g. intranet (v) hard copy)
- When was it last updated?
 - Keep it organized

Essential Components

- Preliminaries
 - “This is not a contract.”
 - Put this statement, or a similar statement on the footer of every page.
- Employment-at-will
- Reserve the right to modify or change
- Point to other sources of information
- Supersedes all previous handbooks
- Acknowledgement

Equal Employment Opportunity

- Three areas
 - Federal, state, local
- Separate ADA statement
- If I have a complaint, what do I do?
 - General reporting & complaints
 - Don't say “report to any member of management”
- Non-retaliation provision
- Federal contractors additional requirements

Professional Conduct/ Prohibition Against Harassment

- Provide definition of harassment
 - BOLI: "Harassment is any unwelcome verbal, physical or visual conduct related to a legally protected class or status, including but no limited to sex, race, ethnicity, or religion on which impairs the employee's ability to perform his or her job, and/or which creates a hostile, intimidating or offensive work environment. Examples of harassment include: offensive posters, unwelcome comments and touching, jokes, etc."
- Provide examples (federal, state, and local)
 - Verbal, visual, physical
- Provide the process for an employee to come forward
- Provide a wide range of disciplinary action
- Litigation Defenses –
 - Employee claims hostile work environment
 - Court will look at whether employer exercised reasonable care

NLRB Push to Regulate Employer Policies/Rules

- §7 NLRA:
 - Employees shall have a right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,..."
- Conduct must be "protected" and "concerted."
- Areas NLRB is focusing on:
 - Confidentiality, Employee Conduct, Rules Restricting Use of Employer Logo, & Social Media Policies

Protected Activity

- Conduct is protected if it is intended to improve (or even is related to) terms and conditions of employment
- Includes making negative comments about supervisors, pay, workplace safety, company policies

Concerted Activity

- Concerted activity is conduct seeking to involve other employees in issues related to employment.
 - Actions taken “with or on the authority of” other employees;
 - Or to induce lawful group action;
 - If actions are a “logical outgrowth” of concerted activity.

Is a policy unlawful?

- *Lutheran Heritage* Two Step
 - **Step 1:** Does the rule explicitly restrict protected activities?
 - **Step 2:** If not, the rule is still unlawful if:
 - Employees would reasonably construe the language to prohibit §7 activities; or
 - It was promulgated in response to union activity; or
 - It has been applied to restrict §7 rights

Guidelines

- Language is interpreted as a whole and in context – not parsing out individual words or phrases
- Ambiguous policies generally interpreted as prohibiting protected activity
- Expressly stating a policy is “not intended to interfere with protected activity” does not save policy from being deemed unlawful
- TIP: Stay away from overbroad, vague prohibitions.

Electronic Communications/ Technology Resources Policy

- NLRB has become very involved in this area
- When assessing a policy's legality what are they looking at?
 - Is an employee's rights being respected
 - Can an employee discuss the terms and conditions of employment with other employees?
- Protection is very broad

Electronic Comm./ Tech. Right to Privacy & Personal use

- Expectation of privacy (v) legitimate interest in searching, monitoring, videotaping, or drug testing
- Company devices
 - Employees should have no expectation of privacy on emails, personal devices, company resources are subject to monitoring
- Personal Use
 - Complete limitation on business use is unnecessary, is not narrowly tailored and infringes on an employee's § 7 rights
- *Purple Communications* (NLRB decision)
 - ER's electronic systems and equipment "should be used for business purposes only"; prohibited Ees from using ER's equipment to "engage in activities on behalf of organizations or persons with no professional or business affiliation with the Company" and from "sending uninvited email of a personal nature."

Electronic Comm./ Tech. Right to Privacy & Personal use

- *Purple Communications* (continued)
 - Employers likely need to rescind policies prohibiting use of employer e-mail for solicitation:
 - Most of the time, these are not consistently enforced anyway (e.g. Girl Scout Cookies)
- Companies can limit personal use to non-work time
- Employers can continue to monitor computers and emails systems for legitimate management reasons such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability.

Electronic Communications/ Technology Resources Policy

- BYOD policy – clear information regarding privacy, monitoring, and reimbursement (sign acknowledgement)
- No reasonable expectation of privacy
- Time keeping: non-exempt employees
- Data collection after separation of employment
 - What can the employer do to recover information

Social Media Policy

- Avoid overbroad prohibitions
- No one answer to what policy you should use
- Guidance issued by NLRB
 - Unlawful: damaging company, reputation, disparaging or defamatory comments,
 - Lawful: posting criticism of employer on facebook/twitter
 - Terms and conditions of employment with co-workers then protected under §7
- Respectful and professional, abide by anti-discrimination and harassment policies
 - Remove management and supervisors from this provision
- Give examples of prohibited conduct

Confidentiality/Workplace Investigations

- Use a case-by-case assessment whether confidentiality is needed
- What are the objectives of the investigation?
- Need for witness protection?
- Risk of evidence being destroyed?
- Risk of testimony fabrication
- Risk of a cover-up
- Workplace disruption

Confidentiality

Do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses.'

Lawful or Unlawful?

Confidentiality

Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.

Lawful or Unlawful?

Conduct toward company and supervisors

Which one is unlawful?

- Be respectful to the company, other employees, customers, partners, and competitors
- Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business

Social Media

- It is important that employees practice caution and discretion when posting content on social media that could affect the employer's business operation or reputation
- Employees who use social media outside of work hours are expected to observe the following guidelines:
 - Employees who use social media on their own time may still be associated with their employer. In this capacity, employees must observe the guidelines of Employer's Respectful Workplace & Anti-Harassment policy.

Conduct Between Employees

- Any logos or graphics worn by employees must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.
- Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics or religion

Prohibition Against Drug and Alcohol Use

- Goal is to provide a safe and healthy workplace for all employees
- Employee Assistance Program
- Drug Testing – Public Employees
 - Pre-employment testing – only if public safety concern
 - Random drug testing
 - New OSHA Electronic Reporting Rule
- Medical Marijuana
 - Employers do not have to accommodate the use of marijuana even where consistent with OMMA.
 - *Emerald Steel Fabricators, Inc. v. BOLI* (2010)

Best Practices- Drug Policies

- If you have a zero tolerance policy make it express and clear
- Prohibit use, possession, sale of alcohol or drugs, intoxicants that are “illegal under federal, state or local laws.”
- On work time/premises (v) personal time
- “Under the influence” – you define
- Consistent application
- Medical Marijuana – clear and narrow if you are making an exception

Wage and Hour Compliance – The Basics

New/Modification DOL White Collar Exemption

- Eligibility for overtime, description of exempt and non-exempt and description of workweek
- Timekeeping
- Rest periods and meal breaks
 - Breaks for nursing mothers
- Work for overtime needs approval
- Pay deductions and corrections (29 C.F.R. § 541.602)
 - Can turn exempt employee into non-exempt
 - Local and state laws

Oregon Sick Leave (ORS 653.606)

- Oregon Sick Leave
 - Employees not covered – those employed through hiring hall, covered by CBA, with benefits provided by joint multi-employer trust or benefit plan
 - No general CBA waiver
 - New employees
 - Accrual on start date but may only use on 91st day of employment
 - One hour....or four hours if policy allowing employee to use at least 56 hours of paid leave per year for Act qualifying purposes

Oregon Sick Leave

1. Own illness, injury, health condition
2. Care of family member's illness
 - Family member = spouse, parent, child, grandparent or grandchild, in-laws,
3. Any purpose covered by OFLA
 - Parental leave, sick child, bereavement, SHC self
4. For any purpose allowed under Domestic violence, harassment, sexual assault, or stalking law
5. Public health emergencies (closing employee's school or day care; when presence of family member or employee jeopardizes health)
6. Donate to another qualifying employee

Time off and leave provisions

- Use of sick leave Accrual and carry over
 - Can cap at 80 hours or limit use to 40 hrs
- Pay out at termination
 - No requirement under OSL
- Procedures for calling in sick
 - "reasonable notice"
 - Must follow employer's written policy for reasonable advance notice (as soon as practicable)
 - May require anticipated duration of requested time
- Consider including a sick leave request form

Interplay: OSL and Other Leave

- Policies that are substantially equivalent" to, or more generous, will be in compliance
- Paid at "regular rate" in next pay period
- Watch qualification periods for accrual and use
- Employee notice and documentation for use is limited
- Purposes must be expanded
- No retaliation, interference, or discrimination
- Written quarterly notice
- Definition of "unexcused" absences
- What happens when sick leave has been exhausted?

ADA, OFLA, Workers' Comp.

- Separate policies for:
 - Oregon Sick Leave
 - FMLA/OFLA
 - ADA
 - Workers' Compensation
 - Other: Jury duty, bereavement, domestic violence
- Pregnancy disability leave
 - *Young v. UPS*
 - ADA – incapacity is temporary and not a disability you are required to accommodate

Transitional Work

- Workers' Compensation
 - Reemployment and Reinstatement rights – subject to CBA
 - Basic right to reemployment or reinstatement always applies
- ADAAA
 - Reasonable accommodation
- Limit “light duty” within your RTW program (e.g. no more than 6 months)
- Limit types of work permitted in RTW programs
 - Focus on temporary transitional TASKS *not* positions

Question

- If an employer reserves light duty positions for employees with occupational injuries, does the ADA require it to consider reassigning an employee with a disability who is not occupationally injured to such positions as a reasonable accommodation?

Answer

- Yes. An employee with a non-occupational disability is unable to perform the essential functions of the job, and there is no other effective accommodation available, the employer **must** reassign him/her to a vacant reserved light duty position as a reasonable accommodation if
 - (1) s/he can perform its essential functions, with or without a reasonable accommodation; and
 - (2) the reassignment would not impose an undue hardship.
- Reassignment to a vacant position and appropriate modification of an employer's policy are forms of reasonable accommodation required by the ADA, absent undue hardship. <https://www.eeoc.gov/policy/docs/workcomp.html>

ADA Policy

- What do you like about Policy #1 or Policy #2?
- What would you change?
- Is there anything missing?

Tips

- Leave benefits/laws
 - Explain the order in which the accrued leaves are to be used
- Avoid words such as:
 - Must, Will, Shall
 - Permanent
- Avoid regulating off-duty conduct
 - Except if affecting employee's job performance or your business
- Be concise. But don't be too legalistic in wording
- Be original – if borrowing language from other organizations, make sure it fits your workplace
- Be careful – have legal counsel review it annually

Thank You

Sarah Ewing
Sather, Byerly, & Holloway
503-412-3116
sewing@sbhlegal.com
