

EMPLOYEE HANDBOOKS



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Historically, handbooks were optional for employers. However, over time employment laws have increasingly crept-in, influenced and even mandated certain policies and practices. Over the past five years we have seen the number of agency mandates and reviews increase at noticeable rate. As most human resource professionals and labor attorneys know, the company handbook is invariably one of the first documents requested by plaintiff's counsel in almost any employment litigation. Consequently, anything the company has stated in its handbook can and will be used against it in a court of law (or at the agency level). In fact, policies will likely be blown up in front of the jury as exhibits in any employment matter. This is why consideration must be given to every word contained in a handbook to reduce the odds that it will come back to bite the employer in a later lawsuit. Review is warranted as to both legal and practical considerations. An employee handbook also sets forth the expectations of employee behavior and what employees can expect for the company. It must be specific on expectations and flexible for human resources and management to address the infinite number of issues that arise in the workplace.

This paper is not an exhaustive presentation of topics that may be covered in an employee handbook, but rather a collection of suggestions for handbook provisions that are intended to be useful in the workplace as well as in the courtroom. It is also written with federal and Texas law in mind, and does not take into consideration all of the nuances that may be applicable to a multi-state employer.

I. HOT ISSUES AND KEY CASES ON EMPLOYEE HANDBOOKS

A. Guns, Open Carry, and Protecting Employees

Texas passed an open carry law in 2015. As of January 1, 2016, Texans, including Texas employees, may carry any handgun openly or concealed as long as they are licensed by Texas or a state with reciprocity.

Yet, with few exceptions, property owners and lease holders may prohibit the open or concealed carry of handguns on Company property, even by individuals who are licensed or otherwise authorized by law do so. Texas Penal Code Sections 30.06 and 30.07. However, an employer may not legally prohibit an employee from transporting or storing a firearm or ammunition in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area that the employer provides for employees if the employee's possession is authorized by law. Texas Labor Code Section 52.061. This transportation/storage exception for employees does not apply to a vehicle owned or leased by the employer and used by the employee in the course and scope of employment. Texas Labor Code Section 52.062(a)(2). The Texas Labor Code makes clear that the transportation/storage exception does not stop an employer from prohibiting its employees from possessing firearms on Company "premises." The term "premises" is defined as a building or a portion of a building, but excludes any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area. Texas Penal Code Section 46.035(f)(3).

Confusion arises out of the applicable Texas Labor Code provisions detailing this exception and its use of the term "premises," whereas the applicable Texas Penal Code provisions relating to open and concealed carry of handguns use the term "property." This raises the question of whether an employer is limited to prohibiting employee handgun carry only on company "premises" as defined in the Texas Labor Code or whether employers can prohibit employees from carrying on all Company-owned property under the Penal Code. For example, if the employer's property includes employee picnic areas or other greenspace, can the employer

prohibit open or concealed carry in those areas? What about prohibiting an employee from open or concealed carry in employer-owned parking lots, parking garages, sidewalks, or walkways, all of which are excluded in the definition of employer premises under the Texas Labor Code? The Labor Code does not expressly answer this question; however, a reasonable interpretation of the current state of the law would be that the law does not expressly prohibit an employer from extending its prohibition of open and concealed carry to the entire Company property as long as the employer carves out the mandated exception for transportation and storage. The result would basically be a rule prohibiting all open carry, concealed carry, and possession of firearms and ammunition on all Company property, except that the employees would be permitted to transport or store their firearms and ammo in a privately owned vehicle that is not a Company provided vehicle. This interpretation meets the primary goal of the carry exception, which is to allow employers to limit gun carry in the workplace while still allowing employees to carry immediately outside the workplace, in particular, on their commute to and from work.

As for knives, it is illegal in Texas to own a gravity knife. It is illegal to carry openly or concealed any knife with a blade over 5.5 inches long, throwing knives or stars, daggers, bowie knives, swords, or spears. Texas Penal Code Sections 46.01, 46.02, and 46.05. The law does not prohibit switchblades. A Texas employer, however, can create its own list of knives prohibited on Premises (as defined above) to include switchblades and knives with blades smaller than 5.5 inches.

A Texas employer that wishes to enforce its weapons policy as to handguns not just by employee disciplinary action but also by pressing charges for criminal trespass, then as of January 1, 2016, must provide an amended written notice under revised Texas Penal Code 30.06 and a new notice under Texas Penal Code 30.07. These are the same notices that appear in posters alerting members of the public to the Company's prohibition against carrying guns on the Company's property.

For purposes of criminal prosecution, the posters must contain the mandated language:

"Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun."

"Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly." and,

- Appear in contrasting colors with block letters at least one inch in height;
- Appear in both English and Spanish; and
- Be displayed in a conspicuous manner clearly visible to the public at each entrance to the property.

While the general criminal trespass statute does not apply to handgun carry, its language providing what types of communications and displays constitute giving "notice" of trespass is helpful in interpreting the term "property" for purposes of determining where to place the mandatory posters should the Company wish to globally prohibit the open and concealed carry of handguns on its property. Texas Penal Code Section 30.05 provides in relevant part:

CRIMINAL TRESPASS. (a) A person commits an offense if the person enters or remains on or in property of another, including residential land, agricultural land, a recreational vehicle park, a building, or an aircraft or other vehicle, without effective consent and the person:

- (1) had notice that the entry was forbidden; or
 - (2) received notice to depart but failed to do so.
- (b) For purposes of this section:
- (1) "Entry" means the intrusion of the entire body.

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