PRESENTED AT

ESSENTIAL EMPLOYMENT LAW

August 2, 2019
Austin, Texas

EMPLOYEE HANDBOOKS

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EMPLOYEE HANDBOOKS

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. #metoo Movement

In light of the #metoo movement, there has been a spike in complaints filed with the EEOC. Employers should review their current harassment and discrimination policies to make sure that these policies set the tone and expectations of the Company. The policies should be reviewed to provide a number of channels for complaints, requirements on supervisors to elevate complaints, and a description of how the complaints will be investigated. The policy should be no nonsense and robust to make sure that the employees understand the seriousness of this policy and the Company's commitment to maintaining a workplace free of harassment, discrimination and retaliation.

B. NLRB's CONTINUED RETREAT FROM STRICT INTERPRETATION OF HANDBOOKS

For the past few years, handbook policies have drawn the ire of the NLRB. The NLRB has long held that rules or policies that may have a chilling effect on employees' Section 7 activity violates the NLRA. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Even if a policy does not explicitly prohibit such activity, it may still be found unlawful if employees *could* reasonably construe the rule's language to prohibit Section 7 activity. *Id.* In the recent course-changing decision, *The Boeing Company,* 365 NLRB No. 154 (Dec. 14, 2017), the current Board strongly criticized the standard announced in *Lutheran Heritage* that prohibited any rule that ***could*** be interpreted as covering Section 7 activity to add a balancing test and significantly altered the previous jurisprudence on the NLRB's interpretation of its handbook rules when it approved the maintenance of rules promoting "harmonious interactions and relationships".

In the context of the *Boeing* decision, on June 6, 2018, the Office of the General Counsel for the NLRB published Memorandum GC 18-04 to provide guidance to its regional directors on Handbook Rules Post-*Boeing.*

The GC Guidance breaks workplace rules into categories.

1. CATEGORY 1: RULES THAT ARE GENERALLY LAWFUL TO MAINTAIN

These types of rules are generally lawful, "either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the [NLRA], or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule." Memorandum GC 18-04, p. 2. However, the Board rules that the application of a facially neutral rule against employees engaged in protected concerted activity is still unlawful.

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