PRESENTED AT

ESSENTIAL EMPLOYMENT LAW

August 20, 2021
Austin, Texas

EMPLOYEE HANDBOOKS

Connie Cornell

Connie Cornell & Desiree Brutocao
CORNELL SMITH MIERL BRUTOCAO BURTON
Austin, TX
ccornell@cornellsmith.com
512.328.1540

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. 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 from the company. In some instances, it should be specific and in others flexible enough 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. THE PROS & CONS OF HAVING AN EMPLOYEE HANDBOOK

A handbook gives employees a general idea of the conditions and benefits of their employment. It helps to avoid confusion over work rules, sick leave, vacation pay, etc. By memorializing the company's practices, the amount of administrative work necessary to orient new employees and respond to inquiries from existing employees is reduced. If used properly, it serves as a tool for managers to aid in consistent treatment of employees company-wide and thereby reduces the risk that differences in treatment are perceived as discriminatory. Finally, it can reinforce compliance with laws and establish policies that help to insulate the employer from liability. Legally required practices for some employers (i.e.. anti-harassment, EEO, FMLA, etc.) can be set forth in a way that educates employees, informs managers, and demonstrates compliance in investigations and litigation.

Even a well-drafted employee handbook has certain inevitable disadvantages. The handbook sets guidelines for the employer-employee relationship. In spite of language expressly stating that the handbook does not create a contract, its mere existence leads to employee expectations. Failure to follow the handbook becomes suspect in the eyes of co-workers, government agencies, and, ultimately, the jury. Amendments to the handbook may have a negative impact on employee morale, and modifications are occasionally necessary in order to comply with the changing laws and regulations governing employers.

Overall, a well drafted and maintained handbook is advisable. But, doing so requires on ongoing commitment to update and refine company policies.

II. ESTABLISHING WHAT THE HANDBOOK SHOULD ACCOMPLISH

A key purpose of a handbook is to memorialize the company's existing practices. It is generally a mistake for a company to adopt a handbook that does not match its corporate personality or manner of doing business. The variance between the written policy and the actual practice could lead to confusion and inconsistency, thereby reducing the intended benefits of simplification and clarification. It also creates complications when trying to explain to a jury that the company has a policy that it never follows.

Looking to other employers' handbooks for ideas is a way to get started on drafting a handbook; however, once completed, the handbook should be reviewed by multiple people within the company. With each policy, the reviewer should keep in mind one question: does this policy provide a new hire with a realistic picture of how things really work at this company? If a smaller company chooses to leave its managers a great deal of discretion in dealing with personnel matters, then perhaps the topics addressed

by the handbook should be relatively few in number. Larger companies, however, may choose to have more detailed handbooks to support consistency.

A handbook should not be used to instruct supervisors on how to manage employees. Detailed explanations such as what to consider in promotion decisions, how to respond to a harassment complaint, and when to counsel an employee, might be better left out of the handbook since it is distributed to every employee. Larger employers often incorporate such policies into a manual for management use only; however, keep in mind that any such management manual will be discoverable in a lawsuit.

III. THE HANDBOOK'S FIRST FEW PAGES

A. Introduction to the Company

Employers will often place a section at the front of the handbook that briefly introduces the employee to the company. This may include a mission statement, a description of the product or service, or a historical overview of the company's growth. Sometimes there is even a letter from the president of the company. While some puffing about how wonderful a place the company is to work, care should be taken not to include statements that end up being fuel for a plaintiff's fire. As an example, if the management team is made up entirely of white males under the age of 40, incorporating their photographs and identifying them by age may not paint the best picture for the jury in a case claiming discrimination against women, minorities, or older workers. Similarly, referring to the company's approach as "young and energetic" can backfire in an age discrimination case. Similarly, demonstrating the company's size and success with numbers reflecting the annual gross revenue or other financial data may be better suited for another document, and not the employee handbook.

Any goals regarding the employer-employee relationship should not be stated as absolutes. For example, the statement that "At XYZ Co all employees are treated with respect," may prove problematic in certain lawsuits. It might be better to state that "At XYZ Co we strive to see that all employees are treated with respect." This change allows the company to explain in a courtroom that while it cannot control the actions of every employee, the overall goal remains at all times. This is also true in statements regarding the company's position on safety.

Often the beginning portions of the handbook contain statements that come back to haunt those managers taking the witness stand in cases involving injured workers. "Isn't it true that your company's handbook provides, 'The Company will take whatever action is necessary to ensure its employees a safe working environment?" Inevitably, the employee's attorney will then point to something that was not done that theoretically might have prevented the injury. In lieu of the pledge, it may be more prudent to state that, "The Company and the employees join in their efforts to create a working environment that is comfortable and safe."

The portions of employee handbooks that are most often used as a hammer in the courtroom often appear in the sections that precede any policies. It is critical that these introductory portions be reviewed with a raised eyebrow and limited to statements that can be defended if later challenged.

B. Handbook Disclaimers

The handbook often references the policies as guidelines. It then expressly disclaims that any provision of the handbook is intended to create a contract. Furthermore, it preserves the company's right to amend or withdraw the handbook at any time. This type provision should be prominently placed, preferably at the beginning and again in the acknowledgement page to be signed by the employee. Recognize, however, that while important to include this disclaimer, it may cut against any argument by the company that a policy in the handbook is contractually enforceable against an employee.

The handbook for a multi-state employer might express that certain provisions are void to the extent they are inconsistent with state law applicable to a particular out-of-state employee. However, certain state laws mandate that employment handbooks contain specific policy language in certain circumstances, and

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Employee Handbooks

First appeared as part of the conference materials for the
2021 Essential Employment Law: A Practical Course in the Basics session
"Handbooks / Employment Policies"