Employers Council®

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Employee Handbooks

Handbook Design Considerations

HANDBOOK OVERVIEW

All information in the Employee Handbook Guidance is written in general terms and should not be considered a substitute for the rendering of legal or management advice.

A well-drafted employee handbook can be a very useful tool for employers. Handbooks can provide:

- An effective means of communicating with employees,
- A general framework for administering summary guidelines consistently,
- A way to promote the organization's philosophy and culture, and
- A tool for saving managements' time by answering questions commonly asked by employees.

The purpose of the handbook usually determines what topics should be included in the manual. Most handbooks include these elements:

- General information about the organization,
- Summary guidelines affecting the majority of employees,
- Overview of employee benefits, and
- Appropriate disclaimers and acknowledgement to reduce the chance that a handbook will be deemed to be a contract.

An employee handbook does have its risks. In many states, courts have found employee handbook language to form the basis of implied contracts between employers and their employees. Therefore, it is essential that the contents of a handbook be carefully drafted and updated to minimize liability for any contractual obligations that may be asserted.

Employers who would not consistently follow the guidelines outlined in a handbook are probably better off not having one. This may be the case, particularly with small employers, where management wants to remain flexible and prefers to communicate in meetings, in training and orientation sessions, on bulletin boards, and through other less-formal ways.

However, there still may be some information, such as an EEO/Unlawful Harassment policy, that employers are advised or required to distribute to employees. Contact Employers Council to discuss your situation.

MINIMIZING LEGAL RISKS

The law concerning the interpretation and enforceability of employee handbooks continues to evolve. From the cases to date, there are precautions an employer can take in writing a handbook. These precautions are identified below.

Include appropriate disclaimers. Employers are advised to include disclaimer language consistent with their employee relations objectives. To be most effective, these disclaimers should be clear and conspicuous, placed on the first page in bold type. These disclaimers are:

- Handbook and any verbal statements by management are *not* an express or implied employment *contract*.
- Employees and organization have the right to *terminate employment at any time* (employment at-will).
- Current edition *supersedes* all previously issued editions.
- Guidelines and benefits outlined in handbook are only *summaries - not all inclusive*.
- Organization retains *right to change* without notice.
- Only the President can enter into employment agreements.

Avoid contractual language.

"Terms and Conditions of Employment." Use of this and other contractual-sounding language may imply that the handbook is a contract of employment.

Employee "agrees." This phrase may imply a contract.

"Permanent" Employment. The use of the word "permanent" with regard to employees has been construed by some courts to imply lifetime employment. It may not be necessary to label the employees at all, except as full-time, part-time, temporary, etc. Additionally the term "regular" is not needed and does not add anything.

Check for clarity. Any ambiguities will probably be interpreted by the courts in favor of the employee and against the drafter of the document, e.g., the employer.

If you don't mean it, don't say it. Each provision in a handbook could potentially be interpreted as contractually binding. Therefore, do not state anything in the handbook that you do not intend to follow rigorously. Do not use superlatives when imposing an obligation on the organization, such as "we will provide the *best possible* working conditions." Avoid promises such as, "We *will* conduct annual performance appraisals."

Keep the handbook brief. Cover only key issues that concern the majority of employees and that are essential for management to convey to employees. Limiting the handbook to an overview of company guidelines allows management more flexibility in decision making. Should more detailed procedures be needed, reference additional resources or contacts. Generally a handbook should be 25 to 30 pages in length.

An employee handbook is different from an internal policy manual. An employee handbook provides summary guidelines for employees. A policy manual tells supervisors what to do in the performance of their supervisory duties. Employers are advised to avoid instructions for supervisors in employee handbooks. If supervisors inadvertently violate those instructions, lawsuits could result.

Reserve management prérogatives. In guidelines where a certain amount of discretion or judgment may be desired, indicate management's right to exercise that judgment. In such cases,

use terms like “in management’s opinion” or “in our judgment” to reserve management’s rights. There is no need to state this repeatedly throughout the handbook.

Update your handbook. As guidelines and benefits change, it is important to update the employee handbook and to inform employees of the changes in a timely manner. Handbooks should normally be reviewed for changes every one to two years.

Always date the handbook. Date each page if the handbook is in loose-leaf format or if the handbook is composed of numerous electronic files.

Avoid words of limitation on the employer wherever possible. These words could be considered promissory and may invite courts to make their own interpretation of their meaning. Words that may limit the employer include the following examples:

for just cause or cause	gross misconduct
“intentional” falsification	“willful” destruction
“serious” infraction	wherever “possible”
“fair” and “equitable”	seniority
any	progressive discipline
in “all” cases	
every	
reasonable	
entitled to	
employee “rights”	

Use caution with aspirational words or phrases. Employers are advised to be cautious in using words and phrases that may be considered promises that the employer cannot deliver. This may include phrases such as the following:

management “shall,” “will,” “must”	our desire
according to the law	we try
we hope	
we attempt	
we endeavor	

our goal	
we strive to	

Use words that allow management more flexibility in decision making. These include the following examples:

may, can	we ask
employees "should," "must"	typically
employees are expected to	
normally	
generally	
usually	

Avoid overuse of the phrase "corrective action up to and including termination." When an employer states that violations of certain guidelines may result in discharge, but does not state this in others, it could create an expectation that employees are only terminated for specific reasons, and are no longer at-will. The phrase "corrective action up to and including termination" is best reserved for performance documentation. It is better to state that certain behavior will not be tolerated.

Desexualize the employee handbook. Employers should not use "he" or "she" because it might be viewed as sexist. The use of "he/she" is awkward. Employers are advised to use "employees" . . . "they" (third person plural) or "you" (second person singular) in their handbooks.

Be aware of limitations on employee discussions or the sharing of information. Employers must be careful when enacting any handbook provision prohibiting employees from discussing or disseminating information related to working conditions. Cases under the National Labor Relations Act have found internal and external no-discussion of wages or working conditions prohibitions, and guidelines on public or media relations, use of social media, confidentiality, and others to unlawfully restrict employee's NLRA rights. Contact the Labor Relations Department to review these types of handbook provisions to determine whether they could be in violation of the Act.

Arbitration agreements or statements are not appropriate for employee handbooks and they are contracts.

Have Employers Council review your complete handbook periodically for compliance with current laws and regulations. The suggested guideline is at least every two years. Handbook reviews are included in your Employers Council membership.

WHAT EVERY HANDBOOK SHOULD HAVE

The following is a list of significant issues that may be appropriate for an employee handbook. Inclusion of guidelines on these topics may assist employers in handling common problems that arise in the employment relationship. See related sections on each topic in the Employee Handbook Planning Guide for more information.

- Acknowledgement of Receipt (mirrors disclaimer)
- Constructive Discharge (in AZ, unless posted)
- Credible Problem Solving Guideline
- Date of Handbook
- Date of Paydays (in CO, UT and AZ, unless posted)
- Disclaimers (bold, all caps, conspicuous)
- Equal Employment Opportunity/Sexual Harassment
- Ethics/Whistleblower (if Sarbanes-Oxley applies)
- Family and Medical Leave (if covered)
- Hours of Work/Workweek
- Medical Leave (if not covered by FMLA)
- Smoking (check local ordinances, required in Denver, CO)
- Weapons (in AZ and UT)
- State specific mandatory content

HANDBOOK FORMAT

There is no one "best" format for an employee handbook. However, factors that influence the design, format, size, and whether to print or distribute electronically include the following:

- Culture of the organization
- Size of the organization
- Number of locations/states
- Education level of readers
- Volume of material
- Other publications available to employees
- Budget

Other considerations when designing a handbook:

- Provide a table of contents.
- Be clear and concise without being too detailed.
- Keep a balance between requirements that address dos and don'ts and information on organization benefits and services.
- Limit any information that could become outdated.
- Draft for the appropriate audience: all employees.
- Limit the use of legal and technical jargon.
- Use illustrations or graphics where appropriate.
- Use "white space" for variety and easier reading.
- Date the handbook. Date each page if you use loose-leaf format.
- Keep the language simple. Limit sentences to 20 words or less. Use words with one to three syllables.

DISTRIBUTION AND COMMUNICATION

The organization should not leave distribution of the handbook to chance by sending it in the mail or leaving it up to the employee to pick it up. Employers may wish to have supervisors issue copies personally or have an all-employee meeting to give out the handbooks. **It is at this point that the acknowledgment of receipt should be signed by the employee. Employers should obtain acknowledgments when new handbooks are distributed AND each time the handbook is revised.** It may also be possible to have employees acknowledge receipt of the handbook electronically; e.g., through Microsoft Outlook.

There may be some situations where it is inappropriate to obtain an acknowledgment of receipt from all employees; for example, it may be inappropriate in some cases where an employer has recently decertified a union.

At the time of distribution, the employer must emphasize key points if this is a new handbook and key changes if this is a revised handbook. Courts have generally recognized an employer's right to unilaterally modify an employee handbook as long as the employees are informed of the changes. However, the courts in some states may require that employees receive additional consideration, i.e., something of value, in exchange for certain changes to the employment relationship. Employers with operations in multiple states should be aware of this additional requirement and contact the Employment Law Services Department for more information.

ELECTRONIC HANDBOOKS

ADMINISTRATIVE CONSIDERATIONS

The main administrative consideration for employers with electronic handbooks is whether an electronic handbook will accomplish their communication goals with employees, or whether a paper version is more appropriate. Put another way, will the electronic version be user-friendly, or create more work for the employer?

LEGAL CONSIDERATIONS

Employer delivery of electronic handbooks instead of paper documents is increasingly common. In such cases, employers should be aware of potential legal issues.

DISCLAIMERS

Employers who choose to use electronic handbooks should include appropriate disclaimers to maintain the at-will status of employees. Offering an employee a handbook that does not include a disclaimer may expose employers to implied contracts claims based on the handbook's content and jeopardize the at-will status of employees.

Specific problems arise with electronic handbooks because employees can typically select only the topic they are interested in reviewing from an online directory or table of contents. Simply providing the disclaimer as one of the options an employee may select to review will not suffice. Employers need to ensure that employees are actually provided with a copy of the disclaimer. Most states say that disclaimers are only effective if they are properly worded and conspicuous. A number of court rulings about the meaning of "conspicuous" have led employers to use boldface type and all capital letters for the disclaimer.

Similarly, to keep the disclaimer conspicuous, employees should be required to view the Disclaimer before they are able to view any of the contents of the handbook. For example, the disclaimer may be the first screen that an employee views with a box for the employee to click after reading it; and as a trigger for the remaining handbook content to appear. Alternatively, the disclaimer may appear at the top or bottom of every screen of the employee handbook or accompany any portion of the handbook that employees print out.

ACKNOWLEDGMENT OF RECEIPT

In addition to disclaimers, most employers have an acknowledgment of receipt (AOR) form signed by the employee to show that the employee received the handbook and knows that they are responsible for the contents of the handbook. Generally, this acknowledgment should have the same disclaimers as in the handbook itself. Please see Acknowledgment of Receipt for sample handbook language.

With hard copy handbooks, employers place the signed AOR in the employee's personnel file for future reference. The AOR verifies that employees understand that they are responsible to become familiar with the contents of the handbook. With electronic handbooks, appropriate and necessary measures must be taken to ensure that the system for furnishing the handbooks results in actual receipt by employees. Employers must also address how an employee will "sign" for the electronic delivery of the document. Signature issues will be addressed below. Employers may still choose to require employees to complete a hard copy AOR form with their signature to be filed in their personnel folders. This ensures that each employee actually received the handbook.

DIGITAL OR ELECTRONIC SIGNATURES

Laws passed by the federal government and various state governments, the E-Sign Act[i], render an electronic signature as binding, valid, and, with few exceptions, having the same legal effect as a hand written signature. As a result, an electronic document or record has the same legally binding and valid effect as a paper document. Although originally designed for commerce and not expressly addressing human resource issues, the law provides that no contract, signature, or record will be denied "legal effect" simply because it exists in electronic form.

Almost every state has a digital signature law calling for certain requirements to be met. For example, the Colorado Digital Signature Act provides that the use of a digital signature shall have the same force and effect of a manual signature if: (1) it is unique to the person using it, (2) it is capable of verification, (3) it is under the sole control of the person using it, and (4) it is linked to data in such a manner that the electronic or digital signature is invalidated if any data is changed.

It should be noted that none of the electronic signature laws dictate *how* an employer should implement electronic or digital signatures. It is left to the individual employer to select from the various software products available to put electronic signatures into place. A discussion of the differences between electronic and digital signatures might be helpful in making that selection.

ELECTRONIC SIGNATURES

The E-Sign Act defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." The common denominator in the electronic signature is the user's intent to use the electronic designation to "sign" an electronic record.

An electronic signature can be the name in the body of an e-mail message, a personal identification number (PIN), a scanned or digitized image of a handwritten signature, or a bio-metric authentication, such as a fingerprint or retinal scan. A signature should make reproduction or forgery without authorization difficult. It should also identify the document signed and make it almost impossible to alter the text of the document without detection.

With electronic signatures it is important the employee intended to sign the document electronically, or that the employee engaged in the various steps leading up to and including the act of making the electronic signature. An employee cannot be forced to sign a document electronically, and can request to sign a paper copy instead.

Retention is another important element with electronic signatures. Since the law only applies where the employee intended to sign the document, it is important to be able to show the steps leading up to the signature. The employer needs to be able to show that the signature was retained in a way that, "(A) accurately reflects the information set forth in the contract or other record, and (B) remains accessible to all persons who are entitled to access . . . in a form that is capable of being accurately reproduced for later reference."

REPLACING OUTDATED GUIDELINES

Replacing outdated guidelines with electronic handbooks may be more complicated than with paper handbooks. Although it may require only a keystroke to delete a document and replace it

with a new one, it is far more difficult to make sure that employees are not relying on old guidelines. Employers must consider options for making certain the new guidelines are distributed to every employee and are in effect. Employers could send a company-wide e-mail stating that guidelines have changed, and include a link to the intranet site where the new guidelines are written, or include the new guidelines as an attachment to the e-mail. Of course, the old guidelines should be deleted entirely and a new AOR obtained.

ACCESSIBILITY

All employees must have access to the handbook. If they do not have a computer at their workstations, there should be a computer available at some centralized location to provide such access where employees will not feel that someone in management is "looking over their shoulder" while they are reviewing the handbook. Further, online access may be necessary for field representatives with confirmation of the fact that they have access to computers. Employees may need to be trained in how to use computers to access the handbook. Paper copies should be available for workers who do not have access to computers or who do not feel comfortable using electronic access.

If a disabled employee is unable to access the handbook, your company, under the Americans with Disabilities Act (ADA), will need to make accommodations to ensure access.

SECURITY

As with any computer system, adequate security measures must be in place so that no employees or outside sources can unilaterally make changes to the handbook or make copies of the handbook which later might be superseded. Coding a document as "read only," using password protections, or posting the document as a PDF file with the properties set to prevent copying should avoid such occurrences.

MAKING CHANGES

Communicate substantive changes to electronic handbooks to all employees via e-mail, memo, or company meeting. The revised guidelines should be deleted entirely and a new AOR obtained from each employee.

HANDBOOKS AS CONFIDENTIAL DOCUMENTS

LEGAL CONSIDERATIONS

Many employers are moving toward labeling their handbooks as confidential, a practice which has brought increased scrutiny from the National Labor Relations Board. Confidentiality should not be required, as the contents of an employee handbook are freely disseminated and should not contain proprietary employer information.

This practice can have unintended consequences. In *Freund Baking Co.* (168 LRRM 1310) (2001), a company won a union election 30 to 3. The union filed objections to the election alleging that the employee handbook violated the employees' rights because the handbook was

labeled as confidential. The handbook also stated that violations of the confidentiality provisions would result in discipline up to and including termination.

The Board held that the provision in the handbook may have inhibited employees in discussing the terms of the handbook (although there was no evidence of the company ever enforcing the provision or any employees stating that they were actually inhibited). The terms of the handbook included items such as wages and benefits which employees have a right to discuss. Because there was a potential for inhibition, the Board ruled that the language in the handbook violated the NLRA and ordered a new election.

In *Community Hospital of Central California v. N.L.R.B.*, 335 F.3d 1079 (2003), the Board found the employer violated the NLRA where its handbook forbade the "release or disclosure of confidential information concerning patients or employees." The Board reasoned that this language was overbroad and could be "construed by employees to prohibit them from discussing information concerning terms and conditions of employment…"

Given the above, employers should be extremely cautious about any confidentiality provisions they may wish to put in their handbooks, so as to avoid potential NLRA violations.

MANUAL DESIGN – TABLE OF CONTENTS

ADMINISTRATIVE CONSIDERATIONS

The table of contents is a necessary feature in any employee handbook. As the guidelines are more easily referenced, the document is easier for employees to use.

A table of contents should include a detailed listing of those policies or guidelines included in the manual and corresponding page numbers.

Alphabetizing the guidelines may create a negative tone, because often the first guidelines are alcohol/drugs, absenteeism, bereavement, etc. Organizing the table of contents by subject (i.e., Employment, Employee Conduct) helps avoid this.

Index

An index at the back of the book may be used in addition to a table of contents. This is useful if the employee handbook exceeds 25 pages for easier access. Each subject might have two or more references because of different labels people use.

MANUAL DESIGN – TARGET AUDIENCE

ADMINISTRATIVE CONSIDERATIONS

It is important for an employer to identify the target audience for the employee handbook. For readers of the manual, it helps clarify whether or not the guidelines apply to them. If the audience is not specifically defined, the presumption will be that all guidelines apply to all employees.

For drafters of the manual, determining the audience helps determine what guidelines to include and what degree of detail is needed. For example, if the manual is for clerical staff only, the manual would go into issues related to those employees. Identifying the target audience also helps the drafter determine what reading level to target.

The target audience can be identified in two different ways:

1. by a general statement in the front of the manual
2. guideline-by-guideline

The target audience may be indicated in the first part of the manual. A general statement may be on the cover page or on the initial page in the section entitled "About This Handbook."

The target audience could also be identified guideline-by-guideline. However, employers should be cautious about publishing handbooks that point out distinctions between employee groups. For example, if executives have certain benefits that rank-and-file employees do not have, communicate this to executives only. Do not put executive benefits in an all-employee handbook. Where there are significant distinctions between employee groups, it may be advantageous to have separate handbooks.

An all-employee handbook should not include directions for supervisors. Also see the FYI "*Handbooks: Considerations in Drafting a Supervisor's Manual*."

MANUAL DESIGN – TITLE IDEAS

LEGAL CONSIDERATIONS

Employers are advised to avoid titles that contradict any disclaimer that "the handbook is not a contract." Titles to avoid include:

- You and Your Future at
- Personnel Policies and Procedures at
- Procedures Manual of

ADMINISTRATIVE CONSIDERATIONS

A catchy title may make employees more apt to read the handbook. However, the title should be accurate in describing the purpose of the handbook.

The image the employer wishes to portray can be conveyed through the title of the manual. Here are some examples:

- Employee Handbook
- About Your Company
- You and
- Working Together

MULTI-STATE OPERATIONS

There are additional employee handbook considerations for employers with multiple locations. Individual state and local laws may exist which impact the content of employer guidelines. Employers can publish individual state employee handbooks or develop guidelines that satisfy the combined state and local laws.

Employers choosing to develop a combined handbook may wish to include language in the beginning of the handbook addressing state law difference, such as:

Option 1

"The following information is for general employee use. As laws vary from state to state, certain issues based on state law need to be addressed. For additional information, please contact Human Resources."

Option 2

"The following information is for general employee use. State and local laws may vary. Please contact Human Resources if you have a specific concern."

Common examples of where state and local employment law should be examined are listed below. This is not an exhaustive list.

- Extent to which employment-at-will is recognized and exceptions to this doctrine
- Requirements for modifying existing handbooks
- EEO practices and provisions for additional protected classes
- State family and medical leave laws
- Employee access to personnel records
- Lawful activities off-the-job
- Smoking regulations
- Deductions from payroll
- Termination pay
- Jury duty
- Time off for voting
- Drug and alcohol testing
- Vacation carry overs and forfeitures
- Workers' compensation - Are designated providers allowed?
- Wage and hour issues, including breaks, meal periods, and overtime
- State-mandated short-term disability benefits

- State leave laws - domestic violence/crime victims, bone marrow donation, etc.

STAND-ALONE AGREEMENTS

LEGAL CONSIDERATIONS

Employers may use general handbook provisions as a basis for disciplinary actions against employees who violate them. However, employers may also extend the strength of certain handbook provisions for use in a legal proceeding by having employees sign a stand-alone agreement. Please see the applicable Employers Council FYI for further explanation and sample stand-alone agreements for the topics listed below:

- Confidentiality/Non-compete/Non-solicitation
- Offer Letters/Employment Contracts
- Drug and Alcohol
- Payroll Deduction Authorization
- Plan Documents

Employers should also be aware that certain general handbook provisions may be negated by stand-alone verbal or written communications and/or agreements with employees. Most handbooks include disclaimers that employment with the organization is at-will. However, courts may interpret offer letters, applications, performance appraisals, disciplinary actions, and other written communication with employees, as well as verbal statements made by the employer, as stand-alone agreements for specific employment terms.

WHEN AN ORGANIZATION HAS A UNION

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WHEN AN ORGANIZATION IS A PUBLIC SECTOR EMPLOYER

What is a public sector employer?

A "public sector employer" is any state, county, municipality, government agency, quasi government agency, special district, authority, or other public institution. The following factors are considerations when determining whether an organization is considered a public sector employer:

- Whether a governmental agency has supervisory authority over the entity.
- Whether a governmental agency has control over the terms and conditions of employment.
- Whether a source of funding for salaries and wages is a governmental agency.
- Whether the entity's pension and welfare funds or plans are common with those of a governmental agency.
- Whether the employees are subject to common civil service employment policies.

The significance of being a public-sector employer is two-fold. There are special state laws that apply to the public sector, such as open records acts. Also, public sector employers must adhere to the bounds of state and federal constitutions.

Because of the unique issues public employers face, please see the Employers Council FYI "Public Employer Handbook" for a discussion of sections that may require special consideration.