

PLOP, FIZZ,
OH, WHAT A RELIEF IT IS!

AVOIDING HANDBOOK HEARTBURN:
MAXIMIZING EMPLOYMENT
POLICIES TO MINIMIZE LIABILITY

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PRACTICE AREAS:

- Labor and Employment Counseling
- Employment Litigation
- Alternative Dispute Resolution

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HANDBOOKS: FRIEND OR FOE?



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HANDBOOKS: FRIEND OR FOE?

A Handbook can serve several important functions:

- Introduce the organization.
- Explain expectations.
- Answer common employee questions.
- Articulate the consequences for failing to comply with policies and procedures.
- Minimize legal risk ... by encouraging resolution of workplace issues.
- Demonstrate compliance with applicable employment laws!



"Now hold on, Mike. You're talking about embezzlement! And unless I'm very mistaken, that's strictly prohibited in the company's employee handbook!"

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HANDBOOKS: FRIEND OR FOE?



An Employee Handbook can be problematic IF:

- It is poorly drafted or unclear.
- It doesn't align with your organization's *actual* practices.
- It places unnecessary burden on your organization.
- It creates a contractual expectation.
- It contradicts applicable employment laws.
- It hasn't been reviewed in the last 3 years.

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TODAY'S "TREATMENT PLAN"

1. Consider the *purpose* of your handbook.
2. Discuss what to *include*.
3. Identify what you should *omit*.
4. Think about your **Exhibit A**:
how will you prove receipt of and agreement to the handbook's policies when the time comes?



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TODAY'S TREATMENT PLAN: Sometimes, Laughter is the Best Medicine



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**“YOUR HONOR, I *JUST KNOW* THE
PLAINTIFF GOT THE HANDBOOK!”**



“Instead of a long, expensive trial, how about we just do ‘Rock, Paper, Scissors’?”

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PROVE YOUR EMPLOYEES' RECEIPT OF THE HANDBOOK

- Distribution of handbook and periodic changes to all:
 - On-site/off-site employees?
 - Hard copy or electronic form?
- Acceptance of handbook and periodic changes:
 - Execution of paper acknowledgment
 - Electronic confirmation
- Maintaining record/proof of acceptance

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EMPLOYEE HANDBOOK . . . OR CONTRACT?

Courts have recognized handbook provisions may become enforceable as an **employment contract**, if the language:

- Constitutes a definite offer,
- Is communicated to the employee, and
- The employee accepts the offer.

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AVOID THE HANDBOOK CONTRACT

- Handbook's Introduction should state:
 - **THIS IS NOT A CONTRACT.**
 - Your employment with the Company is and shall remain at will.
 - No one except [a designated representative of the Company] has the authority to execute an agreement for a fixed term or contrary to the policies in the handbook.
 - The Company reserves the right to modify the handbook as needed, consistent with applicable law.
 - The handbook belongs to the Company.

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ANOTHER WORD ABOUT AT-WILL EMPLOYMENT . . .

- Consider removing introductory/probationary period in favor of strict at-will employment.
 - What really changes during or after the probationary status?
- If you keep the probationary period...
 - Confirm that completion of this period does not alter the at-will nature of the employment relationship.

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“WE SAID ‘AT-WILL’ AND WE MEANT IT!”

Include a policy about providing truthful information during the application process, and state that failure to do so may result in refusal to consider application further, or termination of employment, if already hired.



"My resumé is *not* all lies!
My name is correct!"



DISCIPLINE POLICIES ARE PROBLEMATIC WHEN THEY ARE:



- Unclear
- Too rigid
- Too formulaic
- Impractical

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DISCIPLINE POLICIES: **ACTION ITEMS**

- Remove formulaic or rigid requirements.
- Ensure flexibility in application of discipline.
- Confirm ability to bypass steps in a progressive discipline policy, depending on the circumstances and severity of the infraction.
- Confirm it does not change the at-will nature of the job.
- Clarify throughout the handbook that discipline may result upon policy violations.

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EEO AND ANTI-HARASSMENT **POLICIES**

- EEO and Anti-Harassment Policies can create problems when they:
 - Fail to cover requisite protected classes.
 - Fail to address all unlawful harassment.
 - Fail to provide a stand-alone policy on reporting discriminatory, harassing, or other offensive conduct.

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IMPROVING EEO AND ANTI-HARASSMENT POLICIES

- Lead with these policies – they are important.
- Match protected classes to the jurisdiction(s) and to number of employees.
- Ensure anti-harassment policy is sufficiently broad to cover all unlawful harassment, not just sexual harassment.
- Use a standalone policy on reporting discriminatory, harassing, offensive conduct.

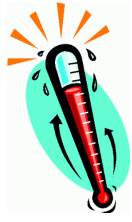
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IMPROVING EEO POLICIES (cont'd)

- Address ADA compliance in EEO policy.
- State the best and most qualified person for the position will be hired for every position, regardless of whether it is a transfer, new hire, etc.
 - The Eighth Circuit Court of Appeals has approved making a disabled employee compete for an open position.

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VACATION/PTO POLICIES: NO MORE “USE IT OR LOSE IT”!

- Nebraska law defines vacation leave as wages.
- Accrued wages must be paid upon termination of employment.
- Once vacation leave (and things that look/feel like vacation leave and have no contingencies on their use, like PTO) is accrued, it cannot be lost.

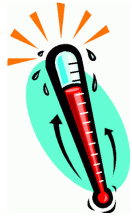
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VACATION/PTO POLICIES: NO MORE “USE IT OR LOSE IT”!

- Review policy language for clarity on accrual, payment upon termination, and avoiding forfeiture during employment (such as end of calendar year).
 - BUT, expressly state sick leave CAN be forfeited upon termination.
- Consider adopting an accrual system that avoids forfeiture and prevents large and/or early build-up of accrued vacation, to decrease overall liability.
 - “Dump” Example: January 1 accrual of ALL leave; followed by January 2 resignation.

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FMLA POLICIES: ARE YOU COMPLIANT AND UP-TO-DATE?

- Has your FMLA policy been updated since 2008 or 2010?
- Do you know who is FMLA-eligible?
- Do your leave policies run concurrently with FMLA?

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FMLA POLICIES: ACTION ITEMS

- Review/revise your FMLA policy:
 - The FMLA was amended in 2008 and 2010 to address leave for care of service members, as well as leave for qualifying exigencies arising out of a military member's active duty or call to active duty.
 - Revise attendance policies that terminate employment automatically upon being absent for certain number of days: could violate the FMLA (and ADA).
- Confirm application of eligibility requirements: "home base" rule
- Ensure PTO/Vacation/Sick Leave, and Worker's Comp leave run concurrently with FMLA.

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DISCRETIONARY LEAVE POLICIES

- QUESTION: Sally has back surgery, takes 12 weeks of FMLA leave, and then takes 4 more weeks of leave under the Company's discretionary leave policy. Is Sally entitled to any more leave from work?
 - *No: the Company's policies do not allow for more leave.*
 - OR
 - *Maybe, if additional leave is reasonable.*

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DISCRETIONARY LEAVE POLICIES AND THE ADA



"But I DO exercise, doc - I exercise discretion!"

Understand the role the ADA (and its state law equivalents) plays with your policies on leave from work!

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TIME IS MONEY: WAGE AND HOUR POLICIES

- Paycheck deductions: a separate, stand-alone agreement signed by employee is required.
- Paycheck deductions generally cannot dip below federal minimum wage requirements.
- Clear policies on recording time, ensuring all time worked is recorded and paid, and OT approval where applicable.
- Add FLSA safe harbor policies about reporting pay errors for both non-exempt and exempt employees.

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WORKPLACE PRIVACY POLICIES



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WORKPLACE PRIVACY POLICIES: ACTION ITEMS

- Confirm employees have no expectation of privacy in the workplace and when using employer-provided resources.
- Incorporate policies that give your organization discretion to act and undercut employee claims to privacy in the workplace, including ability to search premises, desks, lockers, computers, and communication systems.

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EMPLOYEE BENEFITS POLICIES: LESS IS MORE

- Handbook policies regarding employee benefits should not be unnecessarily detailed.
- Benefit policies SHOULD be clear about who receives the benefit.
- Only include a brief description of benefit programs.
- Note specific details may be found in the benefit plan documents, which shall control.

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CLEAR AS MUD

- Can the handbook's language be clarified?
- Does it reflect your organization's actual practices?
- Policies might be added at different times: are policies consistent throughout?

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HIPAA & OTHER REGULATORY POLICIES FOR HEALTH CARE PROVIDERS

- HIPAA & Confidentiality
- Conflict of Interest
- Compliance Program
- Code of Ethics
- Excluded Providers
- Anti-trust Laws
- Fraud and Abuse Laws: Stark Law, Anti-Kickback Statute, False Claims Act, Civil Monetary Penalties Law, etc.
- Relationships with referral sources
- Licensure and professional practice acts

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HIPAA & OTHER REGULATORY POLICIES FOR HEALTH CARE PROVIDERS

- Incorporate into Employee Handbook?
- Incorporate into separate standalone policies?
- Incorporate into a separate compliance manual?
- Acknowledgment of separate policies or manual?
- Acknowledgment of training and education?
- Acknowledgment of no known issues or violations?

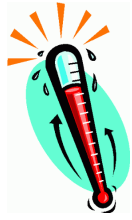
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DRESS CODE POLICIES

Examine dress code policies regarding hairstyles, piercings, and dress attire to determine whether they create the potential for violating Title VII in enforcing stereotypical expectations for gender identity.

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THE NATIONAL LABOR RELATIONS ACT: YES, YOU NEED TO WORRY

- Section 7 Protected Concerted Activity:
 - “Employees shall have the right to...engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection...”
 - According to the National Labor Relations Board (NLRB): “The law we enforce gives employees the right to act together to try to improve their pay and working conditions, with or without a union.”



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THE NLRB GENERAL COUNSEL'S EXAMPLES

- Confidentiality Provisions
 - Employees have a Section 7 right to discuss terms and conditions of employment with fellow employees and nonemployees
- Unlawful:
 - “Do not discuss customer or employee information outside of work.”
- Lawful:
 - “Do not disclose confidential financial data, or other non-public proprietary company information.”

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THE NLRB GENERAL COUNSEL'S EXAMPLES

Conduct toward Company and Supervisors:
Employees have a Section 7 right to criticize or protest their employer's labor policies or treatment of employees.



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THE NLRB GENERAL COUNSEL'S EXAMPLES

- Conduct toward Company and Supervisors
 - Employees have a Section 7 right to criticize or protest their employer's labor policies or treatment of employees.
- Unlawful
 - "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."
- Lawful
 - "Employees will not be discourteous or disrespectful to a customer or any member of the public."

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THE NLRB GENERAL COUNSEL'S EXAMPLES

○ Conduct toward Fellow Employees

- Employees have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment.

○ Unlawful

- “Do not send unwanted, offensive, or inappropriate e-mails.”

○ Lawful

- “Employees will not be discourteous or disrespectful to a customer or any member of the public.”

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THE NLRB GENERAL COUNSEL'S EXAMPLES

○ Conduct toward Third Parties

- Employees have a Section 7 right to communicate with the news media, government agencies, and other third parties about terms and conditions of employment.

○ Unlawful

- “Employees are not authorized to speak to any representatives of the print and/or electronic media about company matters unless designated to do so by HR.”

○ Lawful

- “The company will respond to the news media in a timely and professional manner only through the designated spokespersons.”

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THE NLRB GENERAL COUNSEL'S EXAMPLES

- Protection of Intellectual Property
 - Employment policies cannot prohibit employees' fair protected use of Company intellectual property.
- Unlawful
 - "Company logos and trademarks may not be used without written consent..."
- Lawful
 - "DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights...Do not infringe..."

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THE NLRB GENERAL COUNSEL'S EXAMPLES

○ Restriction on Leaving Work

- Rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts.

○ Unlawful

- “Walking off the job is prohibited.”

○ Lawful

- “Entering or leaving Company property without permission may result in discharge.”



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THE NLRB GENERAL COUNSEL'S EXAMPLES

○ Conflict of Interest

- Section 7 protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests.

○ Unlawful

- “Employees may not engage in any action that is not in the best interest of the Employer.”

○ Lawful

- “Employees must refrain from any activity or having any financial interest that is inconsistent with the Company's best interest.”

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THE NLRB GENERAL COUNSEL'S EXAMPLES

○ Recordings in the Workplace

- Generally, recording bans should be narrowly tailored to prohibit recording only of information NOT protected by Section 7.
- However, if there is a legitimate need for the ban, such as protecting patient confidentiality or protecting other confidential information, a ban may be appropriate.
- Employers need not permit recordings of meetings with employees

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