

Questions—And Answers

Drafting an Effective Employee Handbook

Kevin J. Smith and Lisa M. Harris

There is substantial value in a well-drafted employee handbook, including reducing the risk of employee lawsuits and providing a document that may be used to defend against lawsuits that are filed. There are of course some disadvantages to having an employee handbook, but they are minimal and far outweighed by the advantages. In many cases, the disadvantages of employee handbooks can be minimized through good drafting. What follows is an overview of the advantages and disadvantages of employee handbooks, a list of key provisions that should be included, and practical tips on drafting and maintaining an effective handbook.

SHOULD EMPLOYERS HAVE AN EMPLOYEE HANDBOOK?

The simple answer is yes. Although not legally required, most, if not all, employers should have an employee handbook.¹ It should not be an in-depth treatise covering every single employment issue that may arise, but it should outline key legal issues and set forth employer expectations regarding employee performance. It should also include an overview of employee leave entitlements and benefits, if any.

WHAT ARE THE ADVANTAGES OF A WELL-DRAFTED EMPLOYEE HANDBOOK?

There are many advantages to maintaining a well-drafted employee handbook, including those that follow. An employee handbook:

1. *Reiterates the at-will status of employment.* The employee handbook should emphasize that employment is at-will and may be terminated at any time for any reason, or no reason, with or without notice. As described in detail later, the employee handbook should clearly convey that none of the policies in the employee handbook alter the at-will status of employment.
2. *Minimizes time spent answering general questions that can be easily addressed in the employee handbook.* In the real world, companies have a limited amount of time to orient new employees, and much of that time is spent filling out required employment forms like Form I-9s, W-2s, and benefit-enrollment forms. Accordingly, the employee handbook serves as a great tool for answering basic employment questions related to, for example, office hours and leave entitlements. HR personnel and managers should highlight and review with employees key provisions in the handbook such as the antidiscrimination and antiharassment policies, but other policies can be left for the employee to review on his or her own.
3. *Clearly defines and communicates policies applicable to all employees, which promotes a sense of fairness, if enforced uniformly.* The key here is consistency. Failing to enforce a policy or inconsistently enforcing it can sometimes be worse than having no policy at all. Lackluster and inconsistent enforcement of policies generally leads to low employee morale, can give the appearance of favoritism, and in some cases can be the basis for discrimination, retaliation, and wrongful termination claims. Therefore, it is important to ensure that policies are enforced fairly across the company, especially within the same department or group.
4. *Identifies key performance expectations.* Employee handbooks should also set forth the company's expectations of its employees, particularly with regard to performance. Failure to provide written policies could jeopardize the company's legal power to enforce performance expectations. For example, if you never inform employees that there is no expectation of privacy in the company's computer system, it will be difficult to defend against a claim for invasion of privacy based on the company's search of a company-issued computer or e-mail account.
5. *Facilitates discipline by providing a document that management and HR personnel can point to when a policy has been violated.* Once an employee is issued the employee handbook and acknowledges his or her obligation to comply with the policies therein, he or she can no longer legitimately claim that he or she was not aware that proscribed conduct violates company policy.
6. *Outlines employer and employee rights and responsibilities.* The employee handbook should provide at least an overview of employer and employee rights and responsibilities. For example, are employees entitled to paid time off, and if so, how does it accrue and what are the requirements for

using accrued paid time off? Are employees eligible for overtime, and do employees need approval before working overtime? When is an employee entitled to leave under the Family and Medical Leave Act, and what are the employee's rights to reinstatement? All of these are questions that should be answered in your employee handbook. Employees should always be able to seek clarification and additional information from their managers or HR, but the handbook should answer most of the frequently asked questions.

7. *Promotes consistent treatment throughout the company, which may reduce employee lawsuits.* This is more applicable to larger employers who have several different managers enforcing the company's policies on a multitude of employees, but even smaller employers can protect themselves from complaints of discrimination and retaliation through uniform and consistent enforcement of their policies. By memorializing the company's policies in the employee handbook, the company clearly conveys its expectations. When expectations are clearly articulated and put in writing, managers are more likely to follow the policies and guidelines when issuing discipline and responding to employee concerns.

WHAT ARE THE DISADVANTAGES OF AN EMPLOYEE HANDBOOK?

There are two key disadvantages to an employee handbook:

1. It reduces the company's flexibility.
2. It creates a responsibility on the part of the company to ensure compliance with its own policies, as well as uniform managerial enforcement.

Both of these disadvantages, however, can be minimized with careful drafting of the employee handbook and training of the managers who are meant to enforce it.

Maintaining Flexibility

Of course, memorializing the company's policies clearly limits the company's flexibility, but by including a clear statement in the employee handbook that it is subject to revisions and amendments by the company in its sole discretion, an employer can prospectively modify policies by revising the employee handbook or merely informing employees of the change. Note that employees should be notified of any changes in writing so that the company can later reference the notification document.

Companies should also build flexibility into their policies. For example, if a policy lists prohibited conduct in the workplace, it should clearly state that

the list is nonexhaustive and that the items listed are merely provided as examples. Likewise, if the employee handbook includes a progressive discipline policy, it should clearly state that the employer has the right to deviate from the policy and provide the appropriate disciplinary action under the applicable circumstances. It should also clearly state that neither of the aforementioned policies alter the at-will status of the employee's employment.

Minimizing Compliance Issues

As an initial matter, when drafting the employee handbook, the company should not promise more than it is willing to provide. For example, employers are not required to provide paid vacation, but if an employer does provide paid vacation, there are laws that limit the forfeiture of that vacation. Accordingly, the company should not promise three weeks' vacation if it is willing to permit employees to take only two. The same is true with leaves of absence. Smaller companies that are not covered by the Family and Medical Leave Act should not promise employees equivalent leave entitlements, unless they are actually willing to provide employees with that leave.

With regard to managerial enforcement, when drafting an employee handbook, companies should seek input from high-level managers to confirm what policies are in practice and how they are implemented, before memorializing them in writing in an employee handbook. In addition, before an employee handbook is distributed to all employees, the company should review the policies with the managers and ensure that they understand the policies and can properly implement them.

WHAT SHOULD BE INCLUDED IN AN EMPLOYEE HANDBOOK?

The following list describes items that should be included in most employee handbooks:

- ❑ *Welcome statement.* Because an employee handbook introduces an employee to the company, we recommend including a welcome statement, along with a brief history of the company and a summary of the company's mission. Although these provisions have no legal impact, they can convey a welcoming environment and have a positive impact on employee morale because they make the new employee feel that he or she is really a part of the company.
- ❑ *At-will statement.* Employers should have a clear statement at the beginning of their employee handbook explaining that, absent a signed employment agreement for a specified term, employment is at-will, and nothing

in the employee handbook alters the at-will status of employment. The at-will statement should also be reinforced throughout the employee handbook in any policy that suggests that employment may be terminated only for specific reasons or at a specific time.

- ❑ *Contract disclaimer and right to revise.* There is some debate regarding the inclusion of a contract disclaimer that clearly states that the employee handbook is not intended to and does not create a contract of employment or guarantee terms and conditions of employment. Many attorneys recommend the inclusion of a contract disclaimer to reduce, and in some states eliminate, an employee's ability to assert a breach-of-contract claim for failure to adhere to the terms of the employee handbook, while others recommend that companies embrace the idea that the handbook is a contract and draft the best employee handbook possible so that its terms may be effectively enforced against employees who violate policies outlined in the employee handbook. Whether the company decides to include a contract disclaimer or not, it should include a clear statement that nothing in the handbook alters the at-will status of employees' employment and reserve the right to change, revise, and amend any policies included in the employee handbook.
- ❑ *Equal employment opportunity statement.* Most employers are subject to federal and state laws prohibiting employment discrimination and requiring equal employment opportunities. Such laws include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Immigration Reform and Control Act of 1986, and the Americans with Disabilities Act of 1990. Employers covered by these and corresponding state laws should have a clear equal employment opportunity statement prohibiting discrimination in employment based on any of the protected characteristics.
- ❑ *Policy against unlawful harassment.* Every employer should have a policy against all forms of unlawful harassment, including sexual harassment. Antiharassment policies that not only prohibit unlawful harassment but set forth a reporting procedure and prohibit retaliation may be used to show that the employer took reasonable steps to prevent and correct unlawful harassment in the workplace when defending against a claim of harassment made by a current or former employee. As such, this is an essential policy for every employer.
- ❑ *Commitment to provide reasonable accommodations, where available, and to engage in the interactive process.* Federal and state discrimination laws prohibit an employer from discriminating against an applicant or employee with a disability. Employers are also required to provide a reasonable accommodation where the accommodation would not cause an undue hardship. Accordingly, we highly recommend including a statement in the

employee handbook regarding the company's commitment to engage in the interactive process and provide reasonable accommodations, where available.

- ❑ Other policies that should be in employee handbooks include but are not limited to:
 - Leaves-of-absence policies, including medical leaves of absence under the Family and Medical Leave Act and any applicable state leave laws;
 - Separation policies, including terminal-pay policy and exit-interview procedures;
 - Disciplinary policies, including attendance policy, prohibited employee conduct, and progressive discipline procedures;
 - Wage-and-hour policies, including employee classifications, overtime eligibility and procedures, and meal and rest-break policies;
 - Workplace safety, security, and antiviolence policies;
 - Conflict-of-interest policy;
 - Whistle-blower policy;
 - Open-door policy;
 - Employee-grievance policy;
 - Immigration-law-compliance policy;
 - Benefits descriptions and disclaimers, including a clear statement that where there is a conflict between the employee handbook and the benefits documents, the benefits documents will govern; and
 - Electronic-equipment usage and communications policies, including Internet, e-mail, and social-media policies.

The above policies are just a few of the many policies that could and should be included in the company's employee handbook. When drafting the employee handbook, HR personnel should carefully consider which laws apply to them and which policies are necessary for their company based on size, geography, and other relevant factors.

WHAT ARE SOME PRACTICAL TIPS FOR PREPARING AN EFFECTIVE EMPLOYEE HANDBOOK?

As mentioned previously, uniform and consistent enforcement of employer policies is essential, and a carefully drafted employee handbook can help ensure this. In preparing the handbook, we suggest the following.

1. *Seek input from your high-level managers.* When drafting or updating an employee handbook, you should seek input from your high-level managers to ensure that the policies set forth in the employee handbook are the actual policies being implemented in practice and to confirm that the

employee handbook addresses recurring issues. In addition, if you involve the managers in the process, they are more likely to understand the policies and enforce them uniformly.

2. *Have your employee handbook reviewed by legal counsel.* Due to continuing changes in federal and state employment laws, it is highly recommended that you have your employee handbook reviewed by legal counsel. It is best if the counsel you use is familiar with the state and local laws where your company has employees. For example, if you have employees in California, an extremely employee-friendly state, and employees in Florida, a very employer-friendly state, the applicable employment laws will vary drastically. You should ensure that the counsel who reviews your employee handbook is aware of those types of differences and will ensure that your employee handbook adequately addresses the state and local laws where your employees are based. In the case of California, the laws are so different from both federal and other state laws that your counsel may recommend drafting a California supplement to your employee handbook to be distributed to your California employees.
3. *Have the employee sign an acknowledgment of receipt.* A well-drafted employee handbook should include an acknowledgment that the employee received the employee handbook and agrees to comply with the policies set forth therein. The acknowledgment should also reiterate that the employee's employment is at-will and contain a clear statement that the employee handbook does not create a contract, if such a disclaimer was included in the handbook. Each employee who receives a copy of the handbook should be required to sign an acknowledgment of receipt. The signed acknowledgment should be kept in the employee's personnel file as proof that the employee received the employee handbook and agreed to comply with the company's policies. This will be particularly helpful when disciplining an employee for violating a company policy, or down the road when the company is trying to prove that the employee was aware of the policy when defending a claim in court.
4. *Keep your handbook current.* Having an out-of-date employee handbook undermines its utility and exposes the company to avoidable legal claims. You should periodically review your employee handbook to confirm that it is still in compliance with applicable law and that it still accurately describes the company's practices. As a general guideline, you should review your employee handbook every year. However, we recommend that companies update their handbook any time there is a material change in the law or their practices.

For example, in recent years, the National Labor Relations Board has attacked employer social-media and other policies that it considers

to be overbroad and to infringe on employees' rights to engage in protected concerted activities. Accordingly, we advised employers to tailor their social-media policies to prohibit employment-related conduct that violated specific policies such as confidentiality and harassment policies and to explicitly state that the social-media policy does not prohibit an employee from engaging in protected concerted activity under the National Labor Relations Act or any other applicable law.² Similarly, if a company changes its vacation policy to limit or prevent the carryover of vacation, the employee handbook should be updated to reflect that change.

Note that if there is a discrete, material change that a company wants to communicate to its employees immediately, the company may issue an addendum or amendment to the employee handbook, rather than updating and redistributing the entire employee handbook. In such circumstances, we recommend that the company include some type of acknowledgment or means of confirming that each employee received the addendum or amendment to the employee handbook.

The company should also keep track of such changes so that they may be included in the employee handbook the next time it is revised. This should be done sparingly to avoid the confusion that may arise from multiple addendums and amendments to an existing employee handbook.

5. *Be prepared to answer questions about company policies.* An employee handbook cannot answer every employee question and cannot address every issue that arises, so you should be well versed in the policies in the employee handbook and be able to answer follow-up questions. Remember that an employee handbook can only be as good as the people who implement and enforce it.

NOTES

1. There are some federal and state laws that require that certain employment policies be reduced to writing (e.g., the Family and Medical Leave Act and antiharassment policies under Title VII), but none of them require an employer to distribute or maintain an employee handbook.
2. For a more detailed look at the National Labor Relations Board's criticism of nonunion employer policies, see "NLRB Actions Increasingly Target Nonunion-Employer Policy Provisions" by Melissa Gonzalez Boyce in this issue of *Employment Relations Today*.

Kevin J. Smith is special counsel at Sheppard, Mullin, Richter & Hampton LLP in the firm's Labor and Employment group. He has extensive experience in employment litigation, including trials and appeals in federal and state courts, and conducting arbitrations and administrative hearings. His employment law practice also includes counseling Fortune 500 companies in all types of employment and labor law matters. He may be contacted at kjsmith@sheppardmullin.com. **Lisa M. Harris** is a labor and employment attorney in the New York and Los Angeles offices of Sheppard, Mullin, Richter & Hampton LLP. She has extensive experience counseling Fortune 500 companies and not-for-profit corporations in all types of employment and traditional labor law matters. She also has experience conducting management and employee trainings and representing management in litigation and arbitration proceedings. She may be contacted at lmharris@sheppardmullin.com.