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Employee Handbooks-Shelter From The Storm

BY DIANE KREBS

There is no avoiding it—employment claims are on the rise. Preliminary statistics from both the Equal Employment Opportunity Commission (EEOC) and its New York state counterpart, the New York State Division of Human Rights (“Division”) show a rise in claims over the past several years. The EEOC, which compiles its data annually, reported an increase of more than 7,000 total claims (approximately 9 percent) in 2007. Moreover, if the pace of claims holds steady at the Division based on reported numbers from early 2008, there should be an 11 percent increase in Division claims in 2008.

Certainly, today’s environment has primed employees to sue. Every day, employees become more sophisticated with respect to navigating the agency and court system to press claims—both meritorious and baseless. Moreover, unemployment is clearly on the rise. According to the Bureau of Labor Statistics (BLS), as of the end of October 2008, national unemployment rates have risen by 1.7 percent over the prior 12 months, and rose .4 percent just in October. New York seems to be following the national trend. As of the end of September 2008, based on BLS’s tentative numbers, unemployment in New York has increased 1.1 percent over the prior 12 months. Given today’s economy, the incentives for lawsuits are ever increasing.

For general counsel, the key—as always, but even more so these days—is prevention. Being proactive requires taking measures to both minimize companies’ risk of exposure to, and maximize the chance of successfully defending against, employment claims. The proper preventive measures will (a) make employees think twice before suing and possibly dissuade them altogether, and (b) put the company in a greater posture to win if employees do sue.

A critical component of this preventive scheme is a comprehensive employee handbook. More and more, general counsels are realizing the benefits of making handbook review and updating a routine, and proactive, part of their responsibilities. The handbook serves multiple uses, making it a key weapon of an employer in minimizing, or assisting in the defense of, litigation. While company policies differ, handbooks serve similar purposes: they enhance employee relations, set forth the company’s expectations of its employees, and explain how the company complies with its legal obligations.

The variations are many, but there are two “legal” statements that all handbooks should contain:

- A statement that all employees are employed at will, and thus, they can be terminated at any time. (Companies with union employees will have to modify the statement.)
- A statement that the handbook is not intended to be an employment contract, and the employer has the right to revise any part at any time.

Employee Relations

As an employee relations tool, a handbook can provide a strong disincentive for an employee to bring a lawsuit; it is much harder to sue an entity of which an employee feels a part and believes is caring, rather than an impersonal corporation that just signs a check. Properly written, a handbook can help employees understand how they fit into the larger scheme of what the company does, and make employees feel an important part of the company. Provisions that can help accomplish this goal include an introduction/welcoming message, description of the company’s business, and a mission statement and/or company philosophy. Another aspect to this employee relations function is making employees feel valued. Having an “open door” or “grievance” policy, and even perhaps an employee suggestion policy, can assist in that regard.

Particularly beneficial to employee relations is to include leave time policies and benefits information in the handbook. While there are also certain legal advantages to including these policies—indeed, policies can accomplish multiple functions—having a list and description of all benefits and leave availability, including those statutorily mandated (e.g., jury duty leave, worker’s compensation) will help make employees feel more protected and see the benefits of being part of the organization, which instills loyalty.

But detail and specificity are critical when creating benefits and leave policies, or they can end up having the opposite of their intended effect. Thus, at the beginning of the benefits chapter, the handbook should contain a general section that gives the employer full discretion to interpret the terms of all benefits programs and determine eligibility and entitlements. Moreover, the section should specify that, to the extent the description in the handbook differs from the plan documents, the plan documents govern. This protects the employer from being bound to something unintended because of a typo.

The employer, with general counsel, should also consider including details about leave time that, if unaddressed, cause confusion later, such as: how much leave time, such as vacation, sick and personal days, does each category of employee get; for example, do part-time employees (however that is defined by your handbook) accrue leave time, and if so, at what rate compared to full-timers? At what rate, for example, on a monthly basis, does leave time accrue? Will the company allow employees to “borrow” future leave time not yet earned? If so, will it require employees to sign a “leave time reimbursement form” permitting the company to deduct the value of that unearned time from a final paycheck should the employee leave the company before earning back the borrowed time?¹ Will the company allow unused leave days to be carried over from year to year (either indefinitely or for a set period of time), have a

straight “use it or lose it” policy, and/or pay out the unused days at the end of the year?

It is also strongly recommended to have policies not only with regard to how much leave time employees get but also with respect to how they go about requesting and getting approval for each form of time off. Employers should anticipate conflicts and the possible need to deny some employees their request to make sure business needs are met. If there is no warning of this in the handbook with some general guidelines of how conflicts are resolved, employees may end up feeling betrayed, or worse yet, lead to claims they were unfairly (i.e., discriminatorily) treated because other employees in similar situations were granted leave time. Typically, business needs override all other factors.

Expectations

A second function of a handbook is to set forth the company's expectation of its employees. These policies make employees feel they understand the rules, and thus if they break those rules and are disciplined for it, employees will not feel unfairly treated. The policies are also affirmative evidence supporting discipline and rebutting any inference of discrimination, in the event the employee chooses to sue. To truly accomplish this function, it is recommended that all such policies contain a statement that violation will lead to discipline, up to and including termination.

Important policies in this regard include:

- **Standards of conduct.** This is essentially a non-exclusive list of conduct that could subject an employee to discipline, up to and including termination. It is a great catch-all provision to apprise employees of what is considered misconduct, one of which should be “non-compliance with any company rule or policy.” Although it may seem overkill to specify in writing that things like gambling, fighting, falsification of records and threatening violence in the workplace are not permitted, remember the function of this policy—it then makes sense.

- **Overtime.** It is important that employees understand overtime is required from time to time, and the company decides both the amount of overtime and who works it. In addition, for non-exempt employees, it should be specified that overtime must be approved in advance by the company; otherwise, a company can end up having a rash of unexpected overtime payments that adversely affects its budget.

- **Telecommunications.** This critical policy should cover all systems (phones, faxes, computers, Internet, etc.), both office and remotely located. Remote locations are often overlooked, but in today's telecommuting environment, it has become even more critical. The policy should, at a minimum: specify that the systems should be used for business only; reinforce the employer's right to monitor and inspect anything created, sent or received via the system; and discuss security measures required of all employees.

- **Confidentiality.** Confidential information is typically defined as information to which employees have gained access as a result of their employment with the company that is not generally made known or available to the public at large. Employees should be prohibited from disclosing such information to anyone or using it for personal purposes.

- **Duty of loyalty/ethics.** This policy works in tandem with the policy on confidentiality. The goal of this policy is to remind employees that no one is allowed to use their position or knowledge gained through employment for personal financial gain, and they all must deal with vendors, contractors and other business contacts in a legitimate manner at all times. It is also recommended to state the employer's position regarding outside employment, give examples of conflicts of interest, and provide a reporting mechanism for potential conflicts. Of course, the topics that may be included in this policy could also vary depending upon the nature of the employer's business and whether there are special loyalty, ethics and conflict issues that accompany such a business.

- **Attendance and punctuality.** While employers must be careful to word these policies to avoid disability discrimination claims, setting distinct parameters for reporting tardiness or absence makes it easier to discipline. Further, it is beneficial to have a job abandonment policy if an employee fails to call or appear for work for a certain number of consecutive work days.

- **Business expenses.** While it is helpful to have guidelines for nature and amounts that may be spent in the pursuit of business, this policy is mentioned here for another reason entirely. It is imperative that companies set standards for the timing and nature of submitting expense reports and ensure employees know they are responsible for the accuracy and truthfulness of all such submissions. Theft via padding expense reports is a genuine concern.

- **Personal use of office equipment, telephones and supplies.** A policy of this nature is actually an anti-theft measure. Costs stack up, in astonishing amounts, just from the fact that workers take pens, reams of paper and even electronics for their own use, not to mention the costs from phone bills and time taken away from work when employees make personal calls. Employees need to be informed that company property, including time, is for company use only, and this includes time spent on personal cell phones.

Compliance

A third purpose of a handbook is to ensure the company is in compliance with all its legal obligations, which will provide some legal cover in the event of a lawsuit. Some of the policies mentioned previously assist with this purpose as well, but others deserve special mention here.

First and foremost, every handbook should contain an equal employment opportunity policy covering all applicable protected classifications and all job-related decisions. It should also indicate that the company makes reasonable accommodations for known disabilities as required by law. General counsel should pay close attention to the protected categories listed in the policy and make sure none are accidentally excluded. Although a catch-all phrase at the end (such as “and all other applicable categories protected

under federal, state and local law") should provide protection, it still will not look good in front of a jury if the one category at issue happened to have been forgotten.

Equally important is an anti-discrimination and anti-harassment policy that covers all forms, not just sexual harassment. A good policy, at a minimum, defines discrimination and harassment, contains a clear reporting procedure and investigation steps, and prohibits retaliation for good faith complaints. The good-faith modifier is important; employers should leave themselves free to terminate employees who make deliberately false accusations or witness statements.

Another "legal" policy pertains to workplace monitoring. Although as a general rule private employees do not have a right of privacy in the workplace, it is always preferable to have a policy specifying this, especially since courts seem to be trying to carve out exceptions recently. See, e.g., *Smith v. NWM-Oklahoma LLC d/b/a LA Weight Loss Centers*, 2008 WL 2705047 (W.D. Okla. July 8, 2008) (claim for privacy violation allowed to proceed where employer monitored in-person meeting between employee and client via baby monitor). In addition, several states have statutes requiring notice, and others are strongly considering passing one.² To provide the greatest protection to the company, the right to monitor should be all-encompassing, including computers and phones, not just surveillance of the employees themselves. In addition, the policy should specify that the company's right to search any employee and any storage location (locker, drawer, filing cabinet, etc.) is unabated, even if storage locations have a lock.

A workable corrective action policy is also important. Unless operating in a union setting, it is advisable for employers not to implement a rigid disciplinary system. It would suffice to provide describe various possible forms of discipline but to say that the form of discipline depends on the circumstances. It is also important to note that, in any event, because the company is an at-will employer, employment can be terminated at any time.

One group of policies that meets the protective legal purpose, but are sometimes overlooked, are wage and hour policies. Examples of these policies follow.

- The different employee classifications and definitions, which are eventually used in different ways, such as allocation of leave time and availability of benefits.
- The time and manner of compensation, including whether or not direct deposit is available.
- The number of hours in a workweek and whether lunch hour is paid or unpaid. This is particularly important for non-exempt employees, since these facts help determine their hourly rate, which is needed for calculating overtime.
- A good faith commitment to only make appropriate wage deductions from an employee's paycheck, as well as a reporting and corrective procedure in the event of a mistake. This allows a company to take advantage of the Fair Labor Standards Act's safe harbor, which helps preserve an employee's designation as "exempt" even in the face of an improper deduction. See 29 C.F.R. 541.603.

Conclusion

This article provides only a taste of the benefits a handbook can bring to a company. It also does not address an equally important companion topic: ensuring protocols are in place to distribute and implement the handbook. A perfectly crafted document will not help a company, and actually can hurt, if it just sits on a shelf, or an employer cannot prove an employee received it, or (worst of all) it is not followed. But in this day and age, general counsel that ignore the potential muscle of a thorough and well-crafted employee handbook does so at his or her - and the company's—peril.



1. Without such a form, the employer cannot utilize self-help to recover that amount.

2. Among the states that already have such a statute are Connecticut (Ct. Gen. St. § 31-48d) and Delaware (19 Del. C. § 705). New York currently has twin bills under consideration (A. 11105 and S. 8178) that would require prior written notice upon hiring and again annually to all employees to inform them of the types of electronic monitoring that may occur, although exceptions would exist for certain limited circumstances.

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