Creating an Employee Handbook – Not a Cure-All, But a Tool

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Editor's Note: *This article is intended to be read in conjunction with the article entitled* "Public Employment Relationships in New Hampshire and Their Effect on Discipline and Termination" *which appears in this issue in the Primex³ in Action section.*

Recently, an Internet search for the term "employee handbooks" returned more than 238,000 "hits" in 0.18 seconds. A number of these hits were links leading to vendors touting a "guaranteed" solution to human resources problems available simply by purchasing their employee handbook policies and templates. Today, most individuals readily acknowledge that an organization will benefit from creating and implementing an employee handbook of some kind. Among the reasons supporting creation and use of employee handbooks are the following concepts:

- A handbook provides a concise, convenient method of communicating policies and procedures to employees.
- A handbook can be a tool to help orient new employees.
- A handbook can serve periodically to remind employees of proper procedures and standards governing their responsibilities.

- A handbook can clarify expectations.
- A handbook can create a sense of fairness and consistency.

When properly constructed and implemented, an employee handbook indeed may facilitate consistent and coordinated application of policies and practices and also may be used to justify variations from "standard" rules. Properly used, a handbook also may assist in defending against employment practices[1] claims. But, before rushing out to purchase a "canned" solution to human resources problems based on Internet searches such as those mentioned above, or other advertising that may come to a local government's office, some words of caution may be in order.

Employee handbooks, viewed positively, can prevent surprises and identify and establish expectations for employees, while providing a framework within which management exercises its rights to control the workplace; but handbooks that are not carefully created or which are used improperly can result in negative consequences, too, such as:

- Creation of unintended legal obligations to employees.
- Modification of employee status (particularly for otherwise at-will employees).
- Institutionalizing practices that may be inconsistent with evolving state and federal labor laws.
- Inconsistent application of handbook guidelines resulting in claims of improper discrimination.

The existence of potential problems arising from the use of handbooks should not necessarily constitute a deterrent to their use, but careful consideration and drafting of policies and practices set forth in a handbook may eliminate or at least diminish many of their negative aspects. Thus, handbooks, if they are to be used in public employment,

must be crafted carefully to fit particular workplace situations, and "one-size-fits-all, off-the-shelf" handbooks may not be a wise alternative.

Accordingly, several "caution signs" should be followed. A first "slow down" sign is to analyze the effect that employee handbooks may have on public employment relationships in New Hampshire. Another sign for caution is to conduct a cost-benefit analysis. A third caution sign is posted when employment handbooks establish overly rigid and inflexible disciplinary standards and procedures.



PRECAUTION #1
Handbook provisions, perhaps unintentionally, may create an employment contract that modifies an employee-employer relationship in New Hampshire.

Employment Relationships in New Hampshire. A first cautionary look at the nature of employment handbooks sets the stage for further discussion and analysis. An employee handbook, in concept and legal effect, should be simply a compilation of workplace policies and practices. Its intent and effect should not extend to changing employment relationships that otherwise exist. Problems arise when a handbook attempts to do more than compile policies, and extends promises of benefits or procedures or continuation of employment for employees. Such handbook provisions, perhaps unintentionally, may create an employment contract that modifies an employee-employer relationship in New Hampshire.

Except where altered in some manner, local government employees in New Hampshire are viewed as at-will employees. However, that status is subject to so many exceptions and variations that this general "rule" sometimes can be viewed as being "swallowed" by the exceptions.[2] At the risk of oversimplification, at-will status means that an employment

relationship is not created for a set term and no specific reason or cause is required for termination. At the same time, though, even at-will employees may not be discharged arbitrarily, illegally, in bad faith, or for reasons that would violate public policy.[3] In addition and as referenced in the article on Public Employment Relationships in this issue, statutes, charters, ordinances, and collective bargaining agreements, as well as individual employment agreements, may negate or alter at-will status.

As just discussed, promulgation of policies and practices, and their compilation in an employee handbook may affect a public employee's status and impinge on employer discretion in handling an employee. Therefore, any resource on employee handbooks will advise employers to be sure to include a "disclaimer" announcing in large, bold-faced print something to the effect that the handbook does not create an employment contract and that it does not alter an employee's at-will status. Such a disclaimer is an important element of a properly drafted handbook, but one should not assume that inclusion of such wording will absolutely insulate an employer from unintended consequences.[4] Instead, the focus should be on the wording of the contents of the handbook, and the relationship between the policies and practices contained in the handbook and applicable governing doctrines and principles concerning the status of the employer's employees.[5]



PRECAUTION #2
Handbooks, whether obtained commercially or developed internally, should be implemented with a cost-benefit analysis in mind.

Handbooks Are Not Free. The cost of creating an employee handbook can vary tremendously. One internet site offers its handbook for as low as $34.95. Paying a labor attorney to create one "from scratch" will exceed those costs many times over. Any cost-to-benefit analysis, though, must consider not just the initial "start-up" costs to create the

words on paper (or in a computer file). The real costs must include those relating to:

- Training employees, supervisors, and human resources personnel (and don't forget governing board members!)
- Modification of "model" provisions to meet New Hampshire and local concerns and conditions.
- Defense costs for employment practices litigation, and possible damages from employment practices liability.

Those costs do not include the often-intangible costs of negative effects on the workplace from a rashly drafted handbook. Just as the cheapest tool for a craftsman may not be the most economical, in the long run, a poorly drafted handbook carries "maintenance, upgrade, and repair" costs that are "hidden" until a precipitating incident occurs.

At the same time, there is no need to expend taxpayer dollars reinventing employment practices wheels. It should be remembered that an employment handbook really ought to be merely a selected compilation of existing, modified, and, perhaps, some new policies and practices organized into a cohesive, coordinated communications tool. The content for many handbooks already exists in numerous organizations. The content may be incomplete, poorly worded, or contradictory; yet, the basics often do exist. Existing policies can be assembled and organized by topic. Analytical review from a common sense perspective can eliminate duplication and conflict. Material for "missing pieces" can be obtained from many sources, including but not limited to Primex[3], colleagues, legal counsel, and even those internet sources derided above (if they are judiciously chosen and implemented).

At some point, though, prudence dictates that the organization's legal counsel (or perhaps an attorney well-versed in employment law) should review and oversee the compilation. The time to engage such

services is before the draft is adopted or even circulated for comment if such a practice is used. An attorney can advise on the drafted language and suggest needed modifications, additions, and/or deletions. Perhaps even more importantly advice can be obtained on how to adopt and implement the handbook with particular regard as to dealing with employees already on the job.



PRECAUTION #3
Handbook provisions must preserve employer flexibility and discretion while establishing policies, practices, and procedures that do not create illusory protections for employees. That artful drafting requirement is a key element to success.

A third "caution sign" is posted when employment handbooks establish overly rigid and inflexible disciplinary standards and procedures. So-called "progressive discipline"[6] has an appeal and a rational basis to both employers and employees. Yet, a rigid system, that does not allow for instances in which the usual procedures may be sidestepped, might prevent an employer from acting in a manner commensurate with the nature of an offending employee's conduct. However, merely reserving to the employer the ability to alter steps may not be sufficient to prevent an arbitrator or grievance or appeals board (or even a judge) from substituting their judgment for that of the employer. Thus, a further protection for employers is to insert provisions in the disciplinary process that insure, to the maximum extent possible, that decisions as to when disciplinary procedures may be waived are solely and exclusively within the realm of management.

So, given all these cautionary warnings about inflexible provisions and promises and contracts, how can an "employer-friendly" employment handbook be crafted that has any meaning for employees? One key to

success is to create practices and guidelines for employee conduct without creating promises that the process must be followed in all instances by being honest and straight-forward in the language used.[7] Another key is to avoid creation of expectations by employees that the employer will negotiate or bargain or even "consult" with employees when policy or procedural changes are imposed. Without appearing to be tyrannical, employers need to retain the concept that the workplace is not a democracy. The use of a handbook provides substance to the notion that employers can:

- Establish a positive workplace with high morale and a positive image as employees and management seek to communicate in an understandable manner.
- Have a workforce that understands management practices and the reasons that support workplace practices.
- Create a vehicle for communication channels that facilitate meaningful discussion and feedback.
- Provide protection from improper employee actions that can expose employers to liability to third persons or other employees.

What Goes Into a Handbook? There is no magic list of contents that should or must be included in a handbook. [What should not go into a handbook is discussed later in this article.] Employment lawyers will certainly suggest inclusion of a disclaimer, although, as noted above, disclaimers may have a limited utility. Beyond that basic requirement, handbooks also should note that the handbook may not constitute the "be-all and end-all" to employment policies and practices, and that employees are subject to the employer's requirements whether or not they are included in the handbook.

Language should retain management discretion in administering and using procedures and practices (which admittedly is somewhat

contradictory from the notion posited above that handbooks create consistent, uniform practices) Another essential component of a handbook is a statement reserving the right to add, amend, or rescind any provision of the handbook with "acceptable" notice of the change being whatever notice is provided by the employer.[8] The "laundry list" of possible subjects then can include topics such as:

- An organizational overview and philosophy of "customer" service
- Workweek and hours
- General standards of workplace conduct and "civility" and language regarding conduct not specifically covered by the handbook
- Compensation, leave, and benefits
- Drug, alcohol, and smoking policies
- Harassment and discrimination including specific language on retaliation
- Attendance and competence in performance of duties
- Safety and health
- Employee assistance programs
- Dress codes
- Employee complaint procedures
- Discipline and termination procedures

What Should NOT Go into a Handbook? Just as there is no magic list of handbook ingredients that make up an acceptable handbook recipe, there is no single list of matters that will spoil the end result. However,

like the list of recommended ingredients, there is general agreement on some matters to exclude from a handbook. These suggestions include:

- Avoid language that creates the appearance of a contract by use of words such as "employee accepts the provisions of this handbook," as reviewed in note 8.
- Avoid language stating that employees may be discharged summarily during a probationary period for any reason or no reason.[9]
- Avoid references to cause, proper cause, appropriate reason, and similar terms that connote limits on employer discretion.
- Progressive discipline, if mentioned in the handbook, must be referenced carefully so as to negate any inference that it is mandatory, required, or that, as noted above, management needs a "reason" to vary from the steps mentioned.
- Avoid language that requires employees to provide a minimum number of days' notice before voluntarily terminating employment. Such notice might be requested, but requiring its use, even in order to retain eligibility for accrued, earned benefits, may violate some labor laws and may lend credence to the notion that an employment contract (other than at-will status) exists.[10]

Are there Any Magic Words to Use? As suggested above, a handbook should be created with hands-on involvement of legal counsel who is experienced in labor and employment law. Yet, there are some provisions which seem to be fairly standard, at least as examples. In the coming months, through a new and revised library of handbook sample language[11] and training programs[12] Primex[3] members will have access to expanded sources and resources to assist in the development

of effective employee handbooks. In using these resources, it must be remembered that the examples to be provided will be just that – samples. They will seek to set forth examples of the variety of language that can be included in employee handbooks, but not as express formulations that solve all problems in all cases.

Conclusion. In some instances, employers have resisted attempts to adopt and implement employee handbooks by asserting that creating and compiling policies will "tie an employer's hands" and limit discretion and flexibility to deal with individual circumstances. An initial answer to that criticism lies in analysis of the process by which the handbook was created and the degree of thought and effort that went into that process. A second answer may lie in analysis of the conduct of supervisors and managers who administer the personnel process and asking if they, in fact, are "doing their jobs."

Employment handbooks may not fit all situations. They must be created to fit individual circumstances. No single provision or set of "model" policies will provide complete protection for employers. Handbook language needs to be considered in context, not only of the entirety of the handbook and other policies, but also in light of other governing constraints such as statutes, charters, ordinances, practices, and individual or collective bargaining employment agreements.

Even with those cautions, though, the benefits of a well-crafted and properly implemented employment handbook should be self-evident.

Postscript: In the coming months, Primex³ will be using its revamped website (*www.nhprimex.org*) to unveil a new library that will contain an array of sample policies, language for handbooks, and other matters that will ease the task of creating and using handbooks. Those on-line efforts and resources will be supplemented by a training program to be held at

Primex[3] on June 24, 2008, entitled *Employee Handbooks – Handy Reference or HR Handcuffs*. Details on the program are available at the online training calendar on the Primex[3] web site, *www.nhprimex.org*.

Endnotes

1 Employment practices liability encompasses a wide scope of potential traps for employers. It can include, for example, liability to employees for such matters as wrongful termination, improper discrimination, failure to follow applicable labor laws. The term also can denote liability to other parties caused by employee conduct which can be attributable to the employer, such as negligent hiring or supervision.

2 See, generally, Loughlin, *Local Government Law*, 13 *New Hampshire Practice* §426; *Short v. SAU No. 16*, 136 N.H. 76 (1992). At-will status can be affected by statutes, local government charters, ordinances, personnel policies and practices, and individual or collective employment agreements.

3 One often hears the term "employment contract" as denoting something other an employment-at-will relationship. A true at-will employment, though, is still a contractual relationship, albeit one that can be terminated by either party without the need to demonstrate "just cause" or other specific reasons for termination. New Hampshire court decisions have stated that at-will employment is subject to the underlying doctrine that imposes an obligation to act in good faith. Thus, the "total" discretion vested in an employer in an at-will employment relationship is subject to several exceptions, including actions barred by state statute and actions that violate public policy. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130 (1974); *Cloutier v. Great Atlantic & Pac. Tea Co., Inc.*, 121 N.H. 915 (1981); *Cilley v. New Hampshire Ball Bearings, Inc.*, 128 N.H. 401 (1986).

4 See, e.g., *Butler v. Walker Power, Inc.*, 137 N.H. 432 (1993).

[5] For example, an employee who was given a "letter" outlining expectations of continued employment, could rely on the letter's statements indicating an expectation of continued employment for a given term, even in light of a handbook disclaimer asserting that employees were at-will. In general, employment practices will be viewed as "whole," and individual statements that are inconsistent with that "overall" picture will tend to be discounted. See, e.g., *Dillman v. New Hampshire College*, 150 N.H. 431 (2003).

[6] Progressive discipline usually involves the use of increasingly more severe action based upon repetition or severity of offenses.

[7] An attempt to "sugar coat" management discretion may be made via language such as "in rare cases, management may choose not to follow these procedures when justified." That language may be interpreted as not only suggesting that the defined procedure is the "one" to be used, but also may require an employer to bear the burden of demonstrating that variance from the procedure is indeed justified. Such a requirement opens the door to review by third parties such as administrative agencies or juries.

[8] In response to an assertion that a handbook is a change in employment, the answer says "it may well be." In a true at-will employment situation, an employee has an option not to accept the change – by leaving employment. Exercising the option to remain employed means that the employee accepts (at least legally) the changes made in the handbook. Of course, in employment relationships that are not at-will, an employer may have less of a "free hand" to change policies or practices and, as in a collective bargaining situation, changes that affect terms and conditions of employment that have not been reserved as management rights would likely be subject to negotiation prior to implementation. As noted in the next section of this article, language that implies a

quid-pro-quo "employee accepts the policies and rules as a condition of continued employment" can raise problems.

[9] An at-will employee can be fired at any time for any reason (except for the instances described previously. Inclusion of this "standard" probationary language might imply that an employer therefore has to have a reason (e.g., cause) to discharge an employee after completion of a probationary period. If a probationary period is used, the effect of satisfactory completion thereof should result in little more than a name change in the employee's status.

[10] Guidance from experienced legal counsel may be particularly valuable in assessing provisions regarding eligibility for benefits in these circumstances. Certainly, an employer does not wish to "give away the store" to an employee who leaves without providing adequate notice. The notion that the employer may be providing something tangible for employee conduct may give rise to contract considerations. Additionally, consideration should be given to the problems associated with mandating that an employee continue to work when that employee wants nothing other than to sever the employment relationship.

[11] As part of a new and improved Primex[3] web site at *www.nhprimex.org*, members will have access to an expanded and improved library containing an array of risk management tools and sample policies and documents. Access to these resources will be available through members-only access to dedicate sections of the website.

[12] For example, on June 24, 2008, the training calendar includes a program entitled *Employee Handbooks – Handy Reference or Human Resource Handcuffs.*