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THE EFFECTIVE REVIEW OF PERSONNEL POLICIES AND EMPLOYEE HANDBOOKS

Introduction

Must-Have Handbook Clauses

1. At-Will Status

   If your state is an "at-will" state, your handbook should clearly state that all of your employees are employed on an "at-will" basis unless they are expressly and specifically granted another employment status by applicable state law or by separate written documents signed by your mayor, that both your municipality and the employee have the right to terminate their employment relationship at any time for any lawful reason or for no reason at all, and that nothing in your handbook alters or limits that right.

2. No Employment Contract

   Every employee handbook should contain a clear disclaimer stating that it is not an employment contract, does not guarantee continued employment, and that your municipality reserves the right to change, delete, add or otherwise depart from any policies contained therein in any lawful manner.[1] Also make it clear that the passing of a probationary period does not change the "at-will" nature of an employee's employment.

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[1] See, e.g., *Golem v. Village of Put-In-Bay, 222 F. Supp. 2d 924 (N.D. Ohio, 2002)* (A handbook's performance and disciplinary requirements, in the absence of a disclaimer, created binding employment contracts); *Arch of Wyoming v. Sisneros, 971 P. 2d 981 (Wyo., 1999)* (An employer's reservation of its right to unilaterally modify a handbook must be conspicuous and clear to be effective.)

3. General Disclaimer

Every handbook should contain a general disclaimer stating that it is not intended to and does not provide an exhaustive listing of every employer policy and procedure, and that it is designed to help answer commonly asked questions and to set forth the principal rules and procedures under which your municipality operates.

4. Anti-Harassment Policy

Every handbook should contain a policy prohibiting sexual and other unlawful harassment, encourage employees to report any improper workplace actions or statements by other employees, as well as by supervisors, elected officials, vendors, contractors, volunteers or anyone else, and provide multiple avenues of complaint (including a route that does not require any contact with the employee's chain-of-command). It should also prohibit retaliation for any good faith reporting of suspected violations, and require discipline, up to and including immediate termination, for any violation of this policy.[2]

5. EEOC / ADA Statement

Every handbook should state the employer's commitment to abide by all federal, state and local laws prohibiting discrimination on the basis of a suspected class. This statement should also list those protected classes, being sure to include any that may be prohibited by state or local laws but not by federal law. It should also contain a statement prohibiting discrimination against qualified individuals with disabilities in violation of the American's With Disabilities Act or any other applicable disability law.

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[2] See, e.g., *Burlington Industries v. Ellerth, 524 U.S. 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U. S. 775 (1998).*

6. FMLA Statement

Your handbook should contain a separate and distinct statement of employee rights and obligations under the FMLA. [3]

7. Zero Tolerance For Workplace Violence

Your handbook should contain a "zero-tolerance policy" for workplace threats and violence.

8. Business Ethics

Your handbook should contain a general business ethics policy that expresses your municipality's commitment to an ethical workforce. It should also contain a protected whistleblower complaint process.

9. No Bullying Statement

The Indiana Supreme Court recently issued what is perhaps the first workplace bullying decision in the United States holding an employer liable for the bullying of an employee.[4] Include an anti-bullying statement in your handbook.

10. Termination Policy / Rules of Workplace Conduct

Unless your state law requires otherwise, ensure that your handbook termination policy does not promise progressive discipline or that certain employee actions will result in specified forms of discipline only. Avoid any suggestion that employee termination will only be for "just cause," or that you have "permanent employees," unless your state law requires it.

11. Drug / Alcohol / Tobacco / Weapons / Pornography-Free Workplace

Your handbook should contain a policy forbidding the possession or use of illegal drugs, alcohol, firearms and other dangerous weapons and pornography (and possibly tobacco products) in the workplace and/or in municipal vehicles.

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[3] See, www.dol.gov; 29 C.F.R. 825.301(a)(1).

[4] See, *Raess v. Doescher, __ N. E. 2d __, No. 49S02-0710-cv-424 (Ind., Apr. 8, 200.8*

12. Workplace Privacy

Your handbook should clearly dispel any expectation of employee privacy in their office furniture and equipment, their work stations, their work locker, or their company vehicle. All of these areas and things should be subject to employer search at any time for any reason.

13. Employer Records / Employee Personnel Files

Your handbook should contain a policy forbidding the unauthorized removal, duplication or disclosure of municipal records, and making it clear that all records generated at the workplace or pursuant to an employee's job duties are the property of your municipality. Consistent with your state law, your handbook should also contain a clear statement as regards an employee's rights to review and copy documents from his or her own personnel files.

14. Computer Usage And E-Mail

Your handbook should contain a policy stating that all municipal computers and all personal computers used by a municipal employee to perform his or her job duties is subject to employer monitoring, and that an employee has no privacy or confidentiality rights therein. This policy should also require municipal computers to be used only for municipal business, and expressly forbid their use for sending non-business messages, to access on-line auction sites, pornographic sites and the like, to harass or threaten others, or for any other unlawful or prohibited reason. It should also contain a policy for electronic document retention, deletion and back-up.

15. Overtime

Your handbooks should state that all hourly and non-exempt employees must receive advanced approval from their supervisor in order to work overtime.

16. Leave Policies

Set out your employee leave policies in your handbook. This will allow you to satisfy and take advantage of the FMLA provisions that permit an employer to follow its standard policies as regards the provision of health insurance benefits during periods of FMLA leave.

17. Acknowledgement Form

Your handbook should contain a written acknowledgement by the employee that he or she received the handbook, read it and had an opportunity to ask for clarification of any terms or conditions that he or she did not fully understand.

Pitfalls To Avoid In Drafting Or Revising An Employee Handbook

1. Inaccurate Employee Classifications

If an employer misclassifies an employee as exempt from overtime pay in its handbook, that language can be used against it in proving a Fair Labor Standards Act violation.

2. Plain Language

A handbook that cannot be read or understood by your average employee may not be enforceable against that employee in court.[5] Use plain language whenever possible.

3. Unclear or Inconsistent Language

Every word counts in your handbook. Internal inconsistencies, misapplied words or mis-described benefits will be held against you.

4. No Bad Words

Be careful with policies that strictly forbid employees from speaking negatively about their employer or its supervisors. This can raise both First Amendment and National Labor Relations Act Section 7 issues.[6]

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[5] See, e.g., *EEOC v. V & J Foods, 507 F. 3d 575, (7th Cir., 2007)*

5. Drug Testing

Be careful that your handbook drug testing policy is drafted in a manner that does not run afoul of state law or raise Fourth Amendment warrantless search or privacy issues.

6. Employee Assistance Programs

Make sure that your handbook's EAP policy either does not allow your employees' medical problems to be disclosed without their consent or clearly states that your EAP program offers no guarantee of privacy as to the disclosure of such problems, at least to supervisory personnel with a need to know about them.

7. No Solicitation Rule

Ensure that you really want to prohibit Girl Scout cookie solicitations before you put a "no solicitation" rule in your handbook. You cannot pick and choose to whom and for what cause your rule applies without risking running afoul of the First and Fourteenth Amendments and the National Labor Relations Act.

8. Anti-Nepotism Rule

Anti-nepotism rules are being challenged on both disparate treatment and disparate impact grounds, especially when an employee cannot establish a legitimate business necessity for them.[7]

Conclusion

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[6] See, e.g., *KSL Claremont Resort, 344 N.L.R.B. 382 (2005).*

[7] See, e.g., *EEOC v. Roth Packing, 787 F. 2d 318 (8th Cir., 1986); George v. Farmer's Electric, 715 F. 2d 175 (5th Cir., 1983).*