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Personnel Policies: The Good, The Bad and The Ugly

Materials to Accompany Presentation by
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Personnel Policies and Handbooks: The Good, the Bad and the Ugly

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I. Introduction and Overview. On August 31, 2009, an Internet search for the terms "Employee Handbooks" and "Personnel Policies" returned, respectively, 1,950,000 and 38,300,000 hits. As with any such search, numerous hits were duplicates and included sites that had little to do with the search terms. Yet, the number of hits indicates the widespread use and interest in personnel policies and employee handbooks. Some of the "relevant hits" advertised guaranteed fool-proof policies and handbooks that were a real bargain at only $ XXX. Others were sites for employment lawyers or advocacy groups telling employees to consult them to right the many wrongs that employers commit against employees. Some hits led to scholarly publications or other resources. The purpose of this recital is not to describe the Internet as a vast resource for employment law. It merely seeks to set the stage to demonstrate that workplace policies and handbooks are a topic of interest to more than those who have decided to spend an October Sunday morning in Miami attending the IMLA Personnel Section meeting.

At the outset, it is proper to define some terms. For present purposes, "Personnel Policies" may be defined as "rules" governing the workplace. Sometimes the word *rules* is changed to "guidelines," perhaps trying to soften the impact of Personnel Policies in an attempt to provide flexibility and discretion (and to emphasize that employees may be bound by policies, but they will not mandate employer actions). "Handbooks" may be viewed as compilations of policies (all or only a portion of those applicable to a workplace) as a means of providing a convenient document that contains statements of terms and conditions of employment.

As discussed in this paper, neither of the above definitions should accurately convey the true meaning of policies and handbooks, at least in terms of their legal and practical effects in the public sector, local government workplace.

Whether these documents are set forth as individual policies or as policies encompassed within a procedural manual or handbook, the creation and use of

these documents require the application of both art and science. The art and science lie in (a) understanding the legal basis for policies, (b) knowing limits on policies imposed by statutes and case law that is jurisdiction-specific, (c) use of proper drafting, and (d) understanding how policies may affect employees.

This latter element, (d), should include consideration of the:

- Effects, not just of policies that are adopted, but also those that are not adopted;
- Effects of policies that may affect only certain employees or departments;
- Effects of policies on supervisors who must administer them;
- Effects of adopting policies when actual practices vary from the policies; and
- Effects of policies that bind employees but leave management with a free hand to do as it sees fit in any situation without regard to policies.

The materials for this Session include samples and reviews of handbook and policy language. A preliminary, but essential, component in the proper use of policies and handbooks should be consideration and resolution, to the extent possible, of the effects of policies and handbooks as described above.[1] Therefore, the materials also include discussion of the manner in which handbooks and policy language may be created and implemented.

In addition to the outline suggesting a framework for municipal attorneys to consider in fulfilling their role as legal advisor (Part II *infra*), the materials for this session include:

- An article, in pdf format, on policies and handbooks, with a risk management focus. Though the article is based on New Hampshire law in some respects, it is hoped that it will provide additional guidance.[2]
- A reprint, in pdf format, of Attorney Doug Haney's thoughtful and helpful paper prepared for IMLA's Employment Law Seminar presented last fall in Dallas, Texas.
- Some sample policy language on selected topics (Part III, *infra*) and a sample sexual harassment policy, in pdf form, included in supplemental materials.

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[1] Though municipal attorneys may not always understand this component to be within their "job description," the process of understanding the effects of policies and handbooks, in this author's eyes, should be a primary role of a local government's legal advisor and representative.

[2] See Crean, *Creating an Employee Handbook – Not a Cure-All, But a Tool*, reprinted from Awareness in Action, Issue #6, 2008, and included in the materials for this session.

Subsequent to the 2009 IMLA Annual Conference, the Personnel Section hopes to implement additional member services, including an on-line library of sample personnel policy language and a member listserv focused on employment issues.

II. Outline for Issues in Adopting, Amending, Rescinding Policies. The following outline seeks to identify some of the issues that may arise in connection with local government adoption of personnel policies and handbooks. It is hoped that this outline may serve a useful function in setting out a road map to avoid the unpleasant consequences that can arise when policies are copied from manuals, Internet resources, or otherwise created by the use of unwise shortcuts.

I. Authority & Procedure.

A. What, if any, legal authority exists to adopt personnel policies?

B. Who must adopt policies? What procedures must be followed?

C. Will new policies apply to existing employees?

D. Can existing policies be modified? May employees opt out of amendments?

II. Employment Contracts.

A. Collective bargaining agreements and management rights reservation;

B. Individual employment agreements – Are they made subject to policies? Will that work?

III. Effect of Statutes and Common Law.

A. Matters that may be addressed in policies

B. Matters that must be addressed in policies

C. Matters that violate state and federal laws

D. Public policy considerations

E. Not a substitute for posting requirements

F. Matters that should not be included in policies

IV. Drafting.

A. Legal Considerations

B. Understandability by those affected (employees, supervisors and officials)

C. Updating – not just changes in applicable law, but also keeping track of difficulties, disputes

V. Disclaimers, Waivers, and Preservation of Discretion

A. Purpose is to avoid policies/handbook becoming a contract
B. Maximize retained discretion within reasonable limits
C. Effect on at-will employment
D. Know jurisdiction's law on handbooks and policies

III. Sample Personnel Policies

[Notice: These sample policies are not intended as legal advice or guidance and do not represent IMLA's views as to content. The policies are derived from various resources and are intended to serve as starting points from which local government attorneys may embark on the journey of creating for their clients effective and appropriate policies that are adapted to local jurisdictional requirements and other appropriate factors.]

Sample #1 Employee Status.

Employee Status. Except for employees whose status is determined by applicable statute or ordinance to be otherwise, all employees are "employees at-will." This status means that no employee has a contractual right, express or implied, to remain employed; nor may any employee have an expectation of continued employment. Employer may terminate any employee's employment and any employee may terminate his or her employment with or without cause, with or without notice, at any time for any reason. No person other than [the executive officer/governing board] may enter into any agreement for employment with an employee or employ any person on terms other than at-will status. All employees shall acknowledge their status prior to commencement of employment, but the failure of any employee to have done so shall not alter that employee's status. [*Sample Additional Notice:* The ability of at-will employees to terminate employment without notice shall not be deemed to supersede or affect the requirement to provide notice of termination by the employee to be eligible for certain benefits upon termination as provided in Policy Section __.]

Sample #2 Conduct: General Standards and Guidelines/Discipline

General Standards and Guidelines/Discipline

(1) General Standard. Employees shall perform the duties of their respective positions to the best of their abilities and in conformity with their position descriptions and all applicable personnel policies and directives. Each employee, therefore, is expected and required to be aware of and abide by such policies and directives.

In addition, while policies, regulations, and directives may be issued by [the employer], employees must recognize and accept that those documents cannot address all potential instances of unacceptable or improper conduct. Sound judgment and common sense are expected of all employees.

The listing or categories delineated in this section are intended solely as guidelines and do not establish rigid categories that must be followed in all instances.

(2) Employee Conduct Expectations in Specific Situations. Other sections of this policy also set forth guidelines and standards for employees in specific employment situations. [May insert references to them here if desired, but be sure to update references as required.]

(3) Disciplinary Process. In general, issues of employee performance and conduct will be addressed using progressive discipline whereby the level of discipline applied is based on severity or frequency of the issue. The use of progressive discipline, however, is strictly within the discretion of management and its existence or usage is not intended to alter the employment status for any employee, whether that status is "at-will" or otherwise. Management reserves the right to exercise such disciplinary measures as it deems appropriate for any conduct whether it involves express violations of laws, ordinances, policies, regulations, or directives, or otherwise. In most instances, progressive discipline will be imposed in the manner indicated in the following steps. In addition, disciplinary standards guidelines or procedures may be set forth or specified in other personnel policy sections or in other laws, regulations, policies or directives, or in department-specific regulations.

[Here list and briefly summarize steps such as:
Step 1: Verbal warnings.
Step 2: Written warnings.
Step 3: Other Action. (e.g., Return to probationary status; Transfer; Demotion; Suspension; Termination of employment.]

Sample #3: Supervisor Responsibilities. [Supervisors often are the bases for success and failure in human resources. Employers, therefore, may wish to create a separate handbook or set of policies for supervisors that is not distributed to employees generally.]

Supervisors' Responsibilities. An employee's immediate supervisor (whether delineated as foreman, supervisor, department head, or manager) shall seek to

perform supervisory duties objectively. If an employee's performance creates an issue, the supervisor generally should verify that proper instructions and appropriate orientation and training were provided and that the employee is aware of job expectations, and whether repetition of such instruction or training or institution of discipline may be appropriate. In either case, the supervisor shall make note of the situation and place notice thereof in the employee's personnel file.

Sample #4 Employee Expectations. [The primary focus of this policy is to limit employee expectations of privacy in the workplace, not just for searches and drug testing, but also for electronic communications and computer use. The sample policy may seem "wordy," but the hope is to be able to create an understanding and acceptance of the necessity of the policy.]

Employee Privacy.

*(1) General Policy***.** Individual privacy is a matter of concern to many individuals today, and public employees are no exception. [Employer] acknowledges and shares in the concern for individual privacy. At the same time, [Employer] has a vital interest in the security and protection of its premises, property, and processes, and a responsibility to further a safe, productive and personally secure work environment for employees, visitors, and the public. In addition, as a public governmental entity, [employer] is carrying out public functions, operating in a public environment, and subject to public access and disclosure requirements established by the State constitution and applicable law, including (right-to-know or freedom-of-information act), court rules and rulings, and (add references to local ordinance or charter provisions, if any).

Therefore**,** [Employer] must balance these interests. This policy seeks to protect against the unauthorized use and removal of property, to provide a safe environment in the workplace, and to avoid improper expectations of privacy in general and with specific application to inspections, searches and monitoring within the workplace, on the premises, and while performing service for [Employer], and the use of computers, software and other communications.

(2) Workplace Privacy Expectations. Employees must understand and accept that compensated time is to be spent performing services for [Employer]. As part of its management responsibility and authority and accountability to taxpayers and citizens, [Employer] must reserve the right to oversee activities within and about the workplace and to oversee performance of employee's service, no matter where it is physically performed. Therefore, to the extent practicable and appropriate to the circumstances [Employer] will seek to respect individual concerns with private matters; however, employees are not entitled to expect that any activity, property, or conduct will be private and not subject to oversight when conducted on or about the premises, while on compensated time,

or in conjunction with the employee's position, whether formally or informally or directly or indirectly.

(3) Inspections, Searches. To provide a safe environment and to protect important interests, [Employer] reserves the right to conduct announced or unannounced inspections or searches upon suspicion, at random, or periodically. Searches or inspections may include an employee's office, desk, file cabinet, closet, locker, computer files, voice mail, electronic mail or similar places regardless of whether the places are locked or protected by access codes or passwords. Because even a routine search or inspection may result in the discovery of an employee's personal possessions, all employees are encouraged to refrain from bringing into the workplace any item of personal property that they do not wish to reveal to the company. Employees who refuse to cooperate during an inspection or search will not be forcefully detained or searched. However, [Employer] will base any disciplinary decisions on the information that is available, including the employee's refusal to consent to a search. In addition, [Employer] reserves the right to take appropriate action to prevent (a) the unauthorized removal of company property from company premises and (b) the disclosure of confidential information.

(4) Electronic Equipment and Communications. Employees may use e-mail and web browsing only for work-related purposes, and all e-mail and web access logs, and computer files, data and records are subject to being reviewed or monitored. The same rules apply to telephonic, fax, or other communications, including cellular phones. [*Consider adding language here or in paragraph 7 if used, regarding potential tax consequences for personal use of employer-provided equipment.]* [Employer] owns all electronic communications equipment and software used in the workplace. Employee use thereof is permitted only for work-related purposes, except as permitted by paragraph (7). Employees shall not violate software licenses, download unauthorized material, or otherwise engage in prohibited activity. [*A more comprehensive computer and Internet use policy may be adopted as well.]*

(5) Substance Abuse and Testing. See policy section (X) *[if there is one on privacy; otherwise include language here]* for important information about employee privacy and substance abuse and testing.

(6) Private Information. [Employer] intends to comply with all applicable requirements of public disclosure laws, such as (applicable state law), while also seeking to comply with laws that may limit disclosure of information such as the privacy rule of the federal Health Insurance Portability and Accountability Act (HIPAA) to the extent that such rule may apply to [Employer]. To that end, employee information such as wages, hours of work, and general benefits may be deemed public information. Information that is identifiable to an individual employee that would constitute disclosure of Protected Personal Health Information may be considered as confidential

employee personnel records, except when disclosure is permitted, required, or appropriate under applicable law. Employees may have access to their own personnel records in accordance with applicable law.

(7) Permitted Personal Usage. [Employer] recognizes that some employees may need to make contact of a personal nature during working hours for emergencies and other important business that cannot be conducted during off hours. Naturally, to the extent possible such personal business should be conducted during breaks or other times when an employee is not being compensated for working for [Employer]. When it is not feasible to conduct such personal business during break or personal leave time, employees may briefly conduct such business on compensated time, but are expected to make up time or take authorized leave as appropriate. In addition, employees may make limited use of communications equipment for communications related to such emergency or important personal business, but such communications should be limited and not routine and must recognize and acknowledge that the purpose and ownership of such communications equipment is as described in subsection (4) of this policy and policy section (X) *[if there is a section on computer use generally]*. All such communications are subject to monitoring, review, and discovery. Employees who seek to have an expectation of privacy in their personal communications should not use [Employer] equipment or time to conduct such communications. Employees are also expected to advise persons with whom they communicate using the [Employer's] equipment or system of these requirements.

Sample #5. Sexual Harassment. Having a clear, concise, and effective sexual harassment policy is essential. The policy must provide reasonable and non-threatening avenues for reporting harassment and is one area where the policies should mandate that the employer take action in response to a complaint. The policy also must strongly prohibit retaliation. A sample is provided in pdf format in the supplemental materials for this session.

IV. Conclusion. Personnel policies and handbooks are neither cure-alls nor recipes for disaster. Their promulgation is merely one step in human relations in the workplace. Even the most artfully crafted policies can become potential sources of liability if practices are allowed to trump the policies. Thus, local government lawyers need to keep in mind the potential that policies and handbooks can be "good," but they also can have "ugly" and "bad" sides.