Stopping Employee Problems Before They Start—Drafting and Maintaining Effective Employee Handbooks

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I. The Importance of Creating and Maintaining a Current and Legally-Compliant Handbook.

Employee handbooks are an important tool for many companies. While not required by law, they provide vital information to employees regarding company culture, benefits offered, and accepted conduct. A well drafted handbook can prevent misunderstandings and disputes before they arise by providing clear and consistent instruction to employees regarding what is expected of them. Handbooks provide guidance to managers or supervisors who will be enforcing company rules, better ensuring that the rules will be enforced and issues will be handled consistently throughout the workforce. They also inform employees of their rights and obligations under applicable employment laws and provide the employer with an opportunity to demonstrate its commitment to comply with these laws. Handbooks are often a critical piece of evidence in employment-related litigation or administrative proceedings. Thus, it is important that the information included in your handbook complies with applicable employment laws.

Handbooks will differ from employer to employer and there is no single correct way to put one together. The key in creating and maintaining a good employee handbook is to tailor it to your workforce and business needs. Everything included in the handbook, from the introduction to the various policies should be relevant to, and reflective of, your company. For example, if your employees do not travel for work, it likely does not make sense to include a business travel reimbursement policy. Similarly, if a particular law is inapplicable to your company because you do not meet the necessary employee threshold, you should think carefully about whether you want to adopt the requirements of that law in company policy. This issue often arises in the context of the Family Medical Leave Act (FMLA). This federal law provides employees with job-protected leave for qualified medical and family reasons. Employers with 50 or more employees within a 75 mile radius are required to comply with the law, but employers who do not meet this threshold are not. If your company does not currently employ 50 or more employees, and you will not soon meet that threshold, you are likely better off in adopting your own leave policy relating to family and medical issues than adopting wholesale the requirements of the FMLA. Thus, while it may be tempting to use another company's handbook as your own, you should resist the urge to do so. When it comes to employee handbooks, one size does not fit all.

But drafting a good handbook is just the first step. From there it is critical that you review and revise your handbook periodically to ensure that it remains up to date and legally compliant. Completing this review on an annual basis will allow you to take stock of any

changes in the company or applicable law that warrant revisions. Of course, more frequent changes may be necessary if governing laws change in the interim.

Employment laws change regularly and these changes often impact workplace policies. For example, in the past year a number of states have enacted new laws requiring employers to provide paid sick leave to employees. As will be discussed further below, these new laws resulted in the need for many employers to modify existing personal time off policies. Waiting to update your handbook until an issue arises opens you up to potentially significant risk. Employers must stay current on the ever-changing employment laws.

Companies also change. It is important to analyze existing policies on a regular basis to ensure that they actually reflect current company needs and practices. You should consider how your company has changed since you last updated your handbook. If your company has grown in size or expanded into a new jurisdiction since you last reviewed your handbook, you may have become subject to new laws that previously did not apply. If company practice has changed so that the handbook no longer reflects the current method by which you handle certain issues, you should remove, modify, or add new policies or procedures to bring your handbook current. Technological changes also may warrant revisions. If the company has begun providing phones or devices to employees since your last update, you may want to add a policy reflecting the rules relating to use of these devices to the handbook.

Failure to review and update your handbook could render your handbook useless if employees believe that what is written is meaningless or will not be followed. More important, it could lead to company liability if your handbook is not legally compliant. This can all be avoided by regular review and revision of your handbook.

It is important to note that every time you update your handbook, you should redistribute copies to your employees and obtain newly signed acknowledgements from employees that they have received and reviewed the updated handbook, and they understand the policies contained therein. Depending on the breadth of the changes, you may want to provide a cover memorandum or set up a meeting to discuss the new changes.

II. Things to Consider When Updating your Handbook for 2018.

There have been many recent changes in the law that impact company policy and warrant updates to employee handbooks. While more are sure to come in the new year, as you review your handbook this year, the following are few things to consider.

A. Paid Sick Leave.

In 2017, Arizona joined six other states, California, Connecticut, Massachusetts, Oregon, Vermont, and Washington, along with the District of Columbia, in mandating that employers provide paid sick leave to employees. This is in addition to several municipalities that also

require paid sick leave. These laws typically require employers to provide a minimum number of paid sick days or hours to employees and most include guidelines for employee use of the leave and employer record-keeping.

Arizona's law, the Fair Wages and Healthy Families Act, provides employees with up to 40 hours of paid time off for their own or their family member's illness, injury or health condition, need for medical diagnosis, care, or treatment or need for preventative care, or certain absences related to domestic violence, sexual violence, abuse or stalking. The law prohibits employers from retaliating against employees who request or use their paid sick leave and includes strict notice requirements for employers, including information that must be included on or with every paycheck. Under the law, employers are not required to provide additional sick leave if their existing leave policies provide for the same level of benefit as the law. However, there are a number of reasons that you may want to consider modifying paid time off policies to separate the statutory paid sick leave from other paid time off.

First, the law provides that accrued but unused paid sick time shall be carried over from year to year. If all of your paid time off is lumped together, and not separately tracked, this would require you to carry over all accrued but unused time because the paid sick time cannot be differentiated. Second, although the law permits employers to pay employees for accrued but unused sick time at the end of the accrual year rather than carry it over, it requires employers who do so to provide employees with the full entitlement of paid sick leave at the beginning of the subsequent year for immediate use. Depending on the nature of your business, you may prefer to have employees accrue their paid time off as they work. Third, the law also provides that if an employee is separated from employment but then rehired within nine months of separation, the employer is required to reinstate previously accrued but unused paid sick time. Again, if you are not separately tracking sick time from other paid time off, you would arguably be required to reinstate all accrued but unused paid time off to that employee. There are several other intricacies in the law that should be considered. If you have not yet reviewed your paid time off policy to ensure that it does not violate the requirements of this law, you should do so now.

B. NLRB Decisions and Concerted Activity.

Section 7 of the NLRA, which applies both to unionized and non-unionized employers, protects employees' rights to engage in concerted activities for the purposes of collective bargaining or mutual aid or protection. Concerted activities include activities by two or more employees working together to improve hours, wages, or other working conditions. The National Labor Relations Board (NLRB), in recent years, has found employers liable for unfair labor practices under the NLRA based on their determination that the company policies included in the employee handbook either interfere with employees' Section 7 rights, or are so broad that employees would reasonably understand them to be prohibited protected Section 7 activities.

Importantly, the NLRB's practice is to review company policies whenever they investigate a charge. Thus, while you may be supremely confident that a particular employee has no claim, the NLRB will nonetheless take a close look at all employee policies and the focus of the investigation can quickly turn to a case about the handbook. Company policies should therefore be carefully drafted to avoid a finding of an unfair labor practice. Typical policies that can be susceptible to potential issues under the NLRA are policies relating to social media, standards of conduct, or solicitation in the workplace. This area of the law is ever-changing and it is important to keep a careful eye on your policies as the law develops. Policies or statements that may have seemed unobjectionable only a few years ago could now get you in trouble. For example, a blanket ban on employee use of social media in the workplace without differentiating between work and break time could be problematic. Similarly, broad rules that prohibit employees from making negative comments or detrimental statements about the company or coworkers, whether on social media or otherwise, have been found unlawful on the grounds that they are overbroad and could reasonably be construed by employees as prohibiting protected Section 7 activities.

C. Drug Testing/Drug Free Workplace Policies.

Twenty-nine states and the District of Columbia have enacted laws legalizing the medicinal use of marijuana.[1] Of these, eight states and the District of Columbia have legalized recreational use of marijuana.[2] This had led many employers to question whether they can and should continue to include marijuana in their drug screens. The question is further complicated by the fact that the laws in each of these states vary with respect to the balance of rights between employers and employees on the subject. Although many states still permit employers to take adverse employment action against employees for positive drug tests, including positive tests for marijuana, not all do. It is therefore important to understand the applicable law in the jurisdiction(s) where you employ individuals so that drug testing and drug-free workplace policies can be modified accordingly.

Arizona, for example, prohibits employers from discriminating against individuals in hiring, termination or in imposing any term or condition of employment unless a failure to do so would result in the employer losing a monetary or licensing related benefit under federal law. Specifically, employers are prohibited from discriminating against employees or applicants based on their status as a medical marijuana cardholder or because of a qualifying patient's positive drug test for marijuana components or metabolites, unless the individual used, possessed or was impaired by marijuana on company premises or during working hours. In light of these

[1] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.

[2] Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon and Washington.

protections, a generic drug testing or drug-free workplace policy may violate the law. You should therefore review your policies to ensure compliance.

III. Issues Confronting Multi-Jurisdictional Employers.

Employers who have employees in several jurisdictions face an additional set of challenges when implementing and updating their employee handbooks. It is often difficult to craft a single handbook that will comply with the varying laws in each jurisdiction where you have employees. In addition, as employees or office sites are added in new locations, it can be tricky when trying to modify existing handbooks and polices to incorporate the new requirements. As discussed above, paid sick leave and drug testing/legalization laws are very different from state to state and city to city. Some states or municipalities also provide broader employee protections than those included in federal law.

One question that often arises is whether jurisdiction-specific benefits or requirements should be extended to all employees, even if you are not legally required to do so. This is a business decision to be made by your company. There may be reasons to apply some policies to all employees for logistical ease, while others may make more sense to limit to only the necessary jurisdictions.

How you address the structure of your handbook when you have employees in multiple states is also dependent upon your workforce and business needs. There are several approaches to maintaining a legally-compliant handbook in a multi-jurisdictional environment. One approach is to create jurisdiction-specific handbooks for each state where you employ individuals. This works well when you have only a small number of states to deal with and have roughly equal number of employees in each state. Another approach is to include certain provisions within the handbook that apply only to employees in particular states or localities and note them as such. This approach works well for employers who only need to modify one or two policies to comply with jurisdiction-specific laws. A third approach is to create a single handbook that complies with federal law (and any law that is applicable in all relevant jurisdictions) with an addendum for each separate jurisdiction that notes the different or additional policies that apply to the employees in those states. This method works well when you want to maintain basic policies applicable to all employees without having to extend all jurisdiction-specific benefits or requirements to employees that you are not legally required to grant them to.

The key, above all, is to understand your business and create a handbook that will work to help your company further its mission and avoid any preventable issues.