



Employment Law Update

Employee Handbook Checklist: A New Year | The Old Pandemic

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A General Overview

- What Every Handbook Needs
- What to Review/Consider Given the Ongoing Pandemic

Introduction: Who Am I?

Why Have An Employee Handbook?

- Represents company culture and values (opening page)*
- Sets expectations for employer and employee
- Clearly communicates and notifies employees of company policies
- Ensures and demonstrates compliance with federal, state, and local laws (if multiple locations, consider how to address: broad policies versus addressing specific locations)

(See pandemic remote work considerations.)

Handbook “Must Haves”

- Disclaimer
 - Handbook is not a contract of employment; preserves “employee at-will” status
- EEO Statement
- Non-Discrimination and Non-Harassment Policies
 - Sexual harassment addressed separately and in addition to protected classes depending on states where company has business
- Anti-Retaliation Policy
- Complaint Procedures (possibly investigation practices)

Handbook “Must Haves”

- Leave Policies
 - FMLA (if 50+ employees), Sick/Personal Days, PTO, Paid Sick Leave
 - Bereavement, Jury Duty, Voting
 - Many additional state and local leave laws depending on location(s)
- Compensation and Benefits Information (summary only)
 - Medical and Dental, 401K, Profit Sharing, Severance
- Employee Status (Exempt/Nonexempt) & Timekeeping
 - FLSA and State Wage & Hour Law Compliance
- Discipline, Performance Management, & Termination Policies
- Catchall for Standards/Code of Conduct

Handbook—Other Considerations

- Do you need to translate the Employee Handbook into languages besides English?
- Update policies and what to do about it?
 - Always reserve the right to update policies on the intranet.
 - Depending on the amount of revisions, consider redistributing the entire handbook or only those policies that have been updated or revised. Confirm whether employee acknowledgment is needed.
- Is any of the workforce unionized?
 - If any portion of the workforce is unionized, you may have bargaining obligations before implementing new policies or modifying existing policies regarding the unionized employees.

Importance of Employee Handbook: Potential Defense in Litigation

- A legally compliant handbook may provide a legal defense if employer policies/practices are challenged in court.
- Have potential NLRB issues on your radar (even in nonunion workplaces), given the Biden administration.
- Employees should acknowledge that they received and understand the handbook and its policies (signature vs. electronic receipt).

Importance of Complaint Procedure

- Provides method for employees to report/address workplace issues in a way that is comfortable for them
- Shows the employer's commitment to addressing discrimination, harassment, and retaliation
- Creates a written record of the complaint
- Creates uniformity in handling complaints

Complaint Procedure

- What it should include:
 - Whom employees go to if they have a problem
 - Manager? HR? Other individual?
 - Details formal process/procedure to follow to make internal complaint or raise a workplace issue
 - Encourage written complaints—don't require them
- Structured and efficient process to resolve workplace grievances
 - Consider adding investigation process/procedure

A Word on Confidentiality

- Confidentiality and anti-retaliation are paramount to success in resolving workplace complaints.
- Employees are less likely to come forward if they are concerned about confidentiality and retaliation.
- Confidentiality can never be fully promised (example: investigating complaints); policy should make employees aware that complaints and investigations are confidential (to the extent possible).

Pandemic Policies to Consider

Ascertain the nature of the employer's business and organizational structure.

- Is the employer a private or public company?
- What is the employer's industry?
- This information helps determine if there are specific policies that may be particularly important to include in an employee handbook. For example, is the employer a publicly traded company that must comply with the whistleblower protections under the **Sarbanes-Oxley Act of 2002** and the **Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010**?
- Does the employer work in an industry with special wage and hour considerations (such as tipped employees in the hospitality industry)?

Is remote work possible or impossible? Health care, manufacturing vs. office

Pandemic Policies to Consider

Where are your employees working?

Home?

Hybrid?

Office?

What Location?

Identify the states and cities where employees work that may differ from the physical location of the employer's offices or headquarters, including any employees who work remotely from a home office.

The geographic locations of all employees to whom the employee handbook will be distributed determine which state and local laws apply, as many cities have local ordinances or laws that impose additional requirements.

Pandemic Policies to Consider

- Remote Work & Telecommuting + Travel/Business Expense
- Accommodations Policy—Religious Accommodations
- Paid/Unpaid Leave—various state and local laws
- Safety (Vaccinations and Testing, Masks, Social Distancing)
 - Home, Hybrid, In-Office
- Wage & Hour (FLSA & State Laws)
 - Hours of Work—Overtime
- Home Office
- Political Speech + Social Justice Issues

Pandemic Policy – Remote Work

Which state/local laws to apply for the remote employee?

- Locations outside employer's regular work state
- Depends on the particular state and particular laws in state

Generally: Employee regularly working remotely in a state, strong argument laws of that state apply. Strong argument can also be made laws of the employer's primary location apply—where the remote employee continues to report. Maybe BOTH!

Pandemic Policy – Remote Work

What state/local laws to apply for the remote employee?

Definition of “employer” and/or an “employee” may impact the answer.

Example: Some laws say the employee must work in-state a certain number of hours. Other laws require employee only work in the state at all. Still others depend on how many employees the employer employs in state.

Result: Some employees working remotely may receive benefits of multiple state laws. In addition, employers should be mindful of applicable local laws which may be triggered by the employee’s telework in the particular jurisdiction.

Pandemic Policy – Remote Work

Examples, not an exhaustive list, of various state/local considerations:

- Minimum wage rate
- Additional overtime requirements
- Termination notice requirements
- **Business expense reimbursement**
- Final pay requirements
- PTO/vacation forfeiture rules
- Mandatory harassment and discrimination training requirements for employees and managers/supervisors
- Pay equity issues where employer sets different pay levels based on geographic location
- Required paystub information
- Paycheck deductions
- Meal and rest breaks
- **Paid sick leave**
- Paid family
- Other forms of leaves of absence

Pandemic Policy – Remote Work

- Enforceability of non-compete/non-solicitation/confidentiality agreements and the applicable choice-of-law provisions (developing area disfavoring restrictive covenants)*
- Enforceability of arbitration agreements or jury waivers
- Employee ability to access in-network coverage under benefit plans
- Data privacy concerns or requirements and the related return of data or company devices following cessation of employment
- Potential amendments to work visa petitions due to the employee working in a new location
- Proper reporting of remote workers on certain federal government reports (e.g., EEO-1/VETS-4212), in certain state reports, and in affirmative action plans
- Applicable state withholding, unemployment, and workers' compensation taxes

Pandemic Policy – Remote Work

See **SAMPLE DRAFT Hybrid Work Policy Guidelines**

- Eligibility
- Home office safety—ergonomics, safety audit, workers' compensation
- Business expense reimbursement*—historical policies often addressed business travel and not home office (review policy for remote work)
- Office equipment
- Data security, confidentiality
- Return of company property upon termination of employment
- Work from home terms and conditions
- Change in remote work conditions—home office, moving
- Tax implications
- Liability waiver form

Pandemic Policy – Accommodations

Immunocompromised or unable to get vaccinated for medical reasons or based on a sincerely held religious belief

Americans with Disabilities Act (ADA) – Reasonable accommodation unless the modification would cause significant difficulty or expense (undue hardship high threshold)

Title VII Religious Belief* – Accommodation based on a sincerely held religious belief would pose an undue hardship if it would cause more than a de minimis, or trivial, cost to the employer (lower threshold)

Pandemic Policy – Safety

- COVID-19 workplace safety guidelines that are already in place. If we have all learned nothing else during the last couple of years, we have figured out that our scientific knowledge may not necessarily be able to stay ahead of Mother Nature and viruses like COVID-19 and its variants.
- Many employers have adopted vaccination or testing, good hygiene, social distancing, and masking to minimize the spread of the infection.
- The moving target in the courts (including SCOTUS) on vaccines and testing

Pandemic Policy – Political Speech & Social Justice in the Workplace

Personal or political views are not protected under federal anti-discrimination laws, but state laws may vary. Employees take to social media, blogs.

Generational differences in the workplace—Generation Z (outspoken and more demanding)—unconscious bias, micro-aggressions, DEI (the “I” for Inclusion), privilege issues

Biden Administration and the NLRB

- Confidentiality policies (Employee Confidentiality and Proprietary Rights Agreement)
- Use of employer-provided email, telephones, laptops, and other equipment (IT resources and communications systems policy)
- Use of social media (company social media use guidelines)
- Standards of conduct policy
- Limitations on solicitation and distribution of materials in the workplace (solicitation and distribution policy)

Policies to Consider

Social Media Policies

- The popularity of Instagram, Facebook, LinkedIn, Twitter, Pinterest, etc.
- The increase in use of personal smartphones and tablets, especially relating to work being done remotely
- The increase in importance of an entity's online reputation and brand

Social Media Policy

- What should it include?
 - Address prohibited communications on social media
 - Inform employees they have no right to privacy while on social media at work or on employer-issued devices
 - Limit the posting of employer confidential or proprietary information
 - Address the use of social media to disparage, harass, or bully employees in the workplace

Social Media Policy

- Be careful of **employee-protected speech**.
 - The National Labor Relations Act (NLRA) protects employees' rights to act together to address workplace conditions. This applies to you even if you do not have a union.
 - The National Labor Relations Board from the Trump administration is different from the current board under the Biden administration—the return of Obama board policies in nonunion workplaces.

Arbitration Agreements

- Where should they go?
- Arbitration agreements in employee handbooks alone are likely **not binding**.
- Remember—handbooks should have disclaimers stating the handbook is not a contract.
 - Including an agreement to arbitrate in a nonbinding document creates an issue.

Arbitration Agreements

- Better practice is for arbitration agreement to be in a **standalone document**.
 - Arbitration agreement will not be undermined by the fact that the handbook is not a contract for employment.
 - Legislation in certain states following #MeToo movement prohibits mandatory arbitration for sexual harassment claims.

Employee Handbook Wrap-Up

- **Must Haves:** disclaimer, EEO, non-discrimination, non-harassment, anti-retaliation, complaint procedure, leave policies, compensation and benefits summary, employee status (wage and hour), discipline, performance management, termination, catchall for standards of conduct/code of conduct
- **Pandemic Policies to Consider:** remote work, business expense reimbursement, travel, accommodations, paid/unpaid leave, safety, wage and hour, home office, political speech, social justice, social media
- **Biden NLRB Beware:** confidentiality, social media, standards of conduct, anti-solicitation
- **A Reminder of Some Recent/Not-So-Recent Developments:** arbitration agreements, #Me Too, marijuana (drug and alcohol), workplace violence, bullying

Questions?



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