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Making Your Employee Handbook Work For You, Not Against You

By Paul F. Mickey, Jr.

Is your handbook truly up to date? One of the points in the employment relationship where the employer can best position itself to achieve its business objectives is in the setting of policy — a process in which the law affords employers broad latitude. A properly drafted policy manual can help foreclose or limit a lawsuit, and a manual that is prepared or updated carelessly can serve as the foundation for a legal claim. Here are several ways to tell at a glance whether your organization has postured itself to best advantage.

Prohibition of Retaliation

Retaliation is one of the most difficult claims to defend against. Often an employee can posit a plausible claim simply by showing that he/she engaged in some protected activity (such as raising questions about legal compliance or inappropriate conduct) and that some adverse consequence followed. Employees who feel under scrutiny may lodge complaints to lay the groundwork for a retaliation claim and thus ward off discipline. The employer is put in a position of disproving the negative inference, and the test is usually whether reprisal was *a motivating factor*, not whether it was the sole factor. The absence of an articulated anti-retaliation policy hampers the employer's ability to defend itself, in a situation where the playing field may already seem tilted against it. In addition, some statutes require that employers promulgate anti-retaliation policies.

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Document Retention

All employers should have thoughtful and current policies governing the periodic discarding of files and the retention of essential documentation. Getting rid of unneeded files is a practical necessity, but the law requires that certain documents be retained for specific and varying periods of time. And the pendency or threat of legal claims will create an additional retention obligation. The very fact that documents containing evidence relevant to a potential legal claim are discarded can itself create legal liability for employers. Several recent judicial decisions (most notably the federal district court ruling in *Zubulake v. UBS Warburg LLC*) have imposed harsh sanctions on employers who have failed to preserve electronic evidence relevant to a pending EEO claim. Note: Permitting the destruction of evidence can lead a court to instruct a jury that it may infer that the missing records would have supported the plaintiff's case — a potentially devastating blow.

Integrating Leave Policies

Managing employee leave has become one of the most challenging responsibilities of HR departments. Vacation, sick leave, military leave, and other absences need to be tracked carefully and calculated in light of the requirements of federal and state family and medical leave statutes, disabilities laws, workers' compensation regulations, and a host of other ordinances governing leave. Be sure that your policies require proper notice to be given when the company will count leave against statutory entitlements. Remember that when an employee has exhausted one form of the leave, he or she may be entitled to additional time off under a different statute.

Anti-Harassment Policy

In its 1998 *Farragher* and *Ellerth* decisions, the U.S. Supreme Court ruled that even where actionable sexual harassment by a supervisor may have occurred, an employer may limit its liability by showing that it took reasonable care to prevent and promptly correct harassing behavior (and also that the employee unreasonably failed to take advantage of those preventive/corrective measures). Courts regard the promulgation and enforcement of a clear harassment policy as an essential preventive step, and thus a prerequisite for invocation of this affirmative defense. Note that apparently small issues — such as whether the policy provides an alternative reporting channel when the alleged harasser is in the chain of command — may determine whether or not a policy is deemed to provide an effective remedy. Courts have extended the affirmative defense to harassment based on factors other than sex, so employers should ensure that their policies cover all forms of illegal harassment.

FLSA Correction Policy

Recent regulations issued under the Fair Labor Standards Act, issued in part to help employers manage the avalanche of litigation over entitlement to overtime pay, create an opportunity for employers to minimize liability through the prompt correction of errors. To take full advantage of this safe haven, an employer must promulgate a policy instructing employees about the legal limits on its ability to effect pay deductions. In addition, an employer may invoke a new rule allowing partial-week unpaid disciplinary suspensions only if its written rules provide for those unpaid suspensions.

Electronic Communications

Does the company reserve the right to monitor Internet usage and e-mail communications on its system? Does it

forbid access to inappropriate sites? And does it ban the posting of materials on the Web that may embarrass the company or bring discredit on it? If not, when you seek to take otherwise justifiable disciplinary action, you may be met with the invocation of alleged privacy rights, perhaps not preventing you from acting but surely making the task more complicated and disruptive.

Disclaimer

Most employers now understand the crucial importance of including a disclaimer — a clear, visually obvious proclamation at the outset of the manual stating that it is not a contract, that it can be modified at any time, and that employment is at-will. What employers may not appreciate is that courts will sometimes look beyond even properly prepared disclaimers and hold, based on subsequent language in the manual, that the employer has made specific contractually binding commitments. Some courts have reasoned that conjoining a disclaimer with other language implying a commitment creates ambiguity and thus has the effect of opening the door for the plaintiff to argue to a jury that he/she reasonably believed a binding contract was in place. For example, a manual with a proper initial disclaimer might later state, in its section on "discipline," that employees will be discharged only for certain stated reasons, or for "good cause." Repeating the disclaimer incantation several times may seem redundant, but it also may greatly simplify the challenge of resolving future legal claims.

Non-Solicitation and Non-Distribution Policies

The rules regarding non-solicitation and non-distribution are complicated and vary depending on whether the activity is conducted by employees or non-employees, and where the soliciting and distribution of literature takes place. Poorly drafted non-solicitation and non-distribution policies can create problems for employers, and often are used as evidence against the employer in unfair labor practice charges and election objections before the NLRB. An employer's non-solicitation and non-distribution policy should clearly delineate when and where solicitation or the distribution of literature is prohibited, and the restrictions should be in accord with the requirements of the NLRB.

Multi-State Workforces

Key employment laws vary greatly from state to state. Cities and states often protect categories under their EEO laws that are not protected under federal law (sexual orientation, personal appearance, and family responsibility, for example). Some states enforce restrictive covenants vigorously, while others impose limits on employees' future employment opportunities only in very narrow circumstances. Companies with employees in multiple jurisdictions thus face a choice: Should they craft a separate manual for each jurisdiction, or perhaps try to craft one that will apply in whole or in substantial part to employees in all jurisdictions? The former approach is burdensome; the latter runs the risk of being underinclusive in some jurisdictions, while in others the manual may be too broad, to the point where a court will strike down the restriction altogether. Most multi-state employers seek to create a manual that includes the broadest possible collection of rules of general applicability; they then supplement the manual with short statements of policies that apply in particular jurisdictions. You should read your manual from the perspective of the jurisdiction least likely to enforce it and consider what the consequences might be for enforcement of your regime.

Grab Bag

There are a host of other questions you should ask. Do you give employees the right to make copies of their personnel files (giving free discovery to plaintiffs' attorneys)? Do you speak in terms of gender-specific "maternity leave" or more generally about "parental leave"? If you have a list of infractions that invite serious discipline, is the list written flexibly, so as to avoid an argument that conduct that was not iterated deserves a less severe employer response? Does your orientation process involve getting a written acknowledgement from each employee that he/she has read and will obey the rules, so as to foreclose any argument downstream that the manual was never properly presented? Do you forbid all disclosure of information about employee compensation, in possible violation of the NLRB? If you find these problems lurking in your personnel manual, you should address them promptly — your own policy manual should not make the legal landscape more challenging for you.

More Employee Handbook Issues

Here are some additional issues to double check.

Open-Door Policy. If a company intends to allow employees to express their views openly and without fear of retaliation, an Open-Door policy is a good way to encourage employees to bring issues to management for resolution in a friendly and amicable manner. A statement of non-retaliation should be specifically delineated within the policy. (Effective Open-Door policies also help employers argue that employees do not need paid union representation to redress grievances.)

Drug and Alcohol. To maximize safety and productivity, employers should have a comprehensive drug and alcohol policy that prohibits employees from possessing, selling, purchasing, distributing, manufacturing or using (unless authorized by a healthcare provider) alcohol or controlled substances during work hours, on company property, or while on duty. If testing is a possibility, the policy should outline the procedures the company will follow.

Working Off the Clock. An explicit policy forbidding "off the clock" work and requiring employees to report all hours worked may be useful in if the employer must defend claims by employees that they did not receive all earned wages to which they are entitled under federal and state law.

Conflict of Interest and Ethics. The obligation of all employees to adhere to principles of ethical behavior and to avoid actual or potential conflicts of interest should be made explicit. Does the company want to limit the circumstances under which employees may accept gifts from clients or others? If so, that policy should be captured in the policy manual.

Workplace Violence. Many employers today expressly warn employees that they will not tolerate violence or threats of violence at the workplace. The policy should include a prohibition against bringing weapons to work — a situation that arises with surprising frequency.