

Updating Your Employee Handbook

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CLARK HILL

REASONS FOR EMPLOYMENT HANDBOOK

- Prevent Litigation
- Communication Tool for Employees
- Provide Clear Expectations of Conduct
- Provide Overview of Employee Benefits

KEY POLICIES EVERY HANDBOOK SHOULD CONTAIN

- At-will statement
- Equal Employment Opportunity policy
- Harassment, Non-Discrimination and Non-Retaliation
- Disability and request for accommodation policy
- Electronic communication policies/IT/Social Media
- Non-Solicitation
- Wages/Salary

KEY POLICIES EVERY HANDBOOK SHOULD CONTAIN

- Standards of Conduct
- Benefits
- Paid time off
- Leaves
- Social Security Number
- Drug free workplace
- Violence in the workplace

KEY POLICIES EVERY HANDBOOK SHOULD CONTAIN

- Shortened Limitations Period
- Exempt Employee Complaint Procedure
- Document and Record Retention
- Whistleblower Reporting Procedure
- FMLA policy for organizations with 50 or more employees
- Non-solicitation/Non-distribution

AT-WILL STATEMENT

- NLRB – Will find unlawful any policy that defines at-will employment so broadly that employees would reasonably think they could not engage in activity protected by the National Labor Relations Act.
- NLRB found the following unlawful:
 - "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

AT-WILL STATEMENT

- At-will statement cannot foreclose the possibility of future modifications
- A clause that does not require employees to agree that the employment relationship cannot be changed, but merely highlights that the employer's representatives are not authorized to change it - lawful

AT-WILL STATEMENT – FOUND LAWFUL BY NLRB

Employment with the Company is at-will. This means that either you or the Company may terminate your employment at any time, with or without notice or cause. Nothing in this Handbook or in any document or statement by a Supervisor or Manager, shall limit your right or the Company's right to terminate the employment relationship. Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such agreement/modification must be in writing and signed by the employee and the President.

LIMITATION OF CLAIMS/STATUTE OF LIMITATIONS

- Check State law
- Federal law – not as clear
 - Employment claims enforced by EEOC – Sixth Circuit not decided whether shortened six month statute enforceable
 - Several District Courts in Michigan concluded six month statute not enforceable

LIMITATION OF CLAIMS/STATUTE OF LIMITATIONS

- FMLA
 - No Sixth Circuit decision yet
 - Several District Courts in Michigan – six month statute interferes with employee's rights under the FMLA – which contains a 2 or 3 year statute of limitations
- FLSA
 - Sixth Circuit held that six month contractual limitation will not be limit claims under the FLSA oar the EPA

LIMITATION OF CLAIMS/STATUTE OF LIMITATIONS

- Shortened limitation period only enforceable under State law if contained in a valid contract
- If Handbook contains statement that its contents do not form a contract or similar language, shortened limitation period will not be enforceable
- Include shortened limitation period in Employment Application
- EEOC challenging statements in Handbook which contain shortened limitation period for discrimination laws it enforces

EEO POLICY

- Protected categories (check State law)
- Title VII – race, color, religion, sex, pregnancy, childbirth, or related condition, and national origin
- Genetic information – Genetic Information Nondiscrimination Act of 2008 (GINA)
- LGBT – not protected (yet) in most states or federal law

HARASSMENT, NON-DISCRIMINATION AND NON-RETALIATION POLICIES

- Prohibition on ALL forms of harassment and discrimination
- Contains a Complaint Procedure providing employees with options to notify employer at several levels - Supervisor, Human Resources, President, Board of Directors, Outside Counsel
- Contains a statement prohibiting retaliation against those who make a good faith complaint or participate in an investigation under policy

ACCOMMODATION REQUESTS

- Check state law
- Federal/ADA – Accommodation request need not be in writing
- Accommodation request policy – If require request to be in writing should specifically mention State law or contain a separate reference to requesting a reasonable accommodation under Michigan law
 - EEOC challenging policies that state that request must be in writing without referencing State law

SOCIAL SECURITY NUMBER PRIVACY POLICY

- 2004 Michigan implemented requirement that protect access to social security numbers
- If an issue, the Handbook must contain policy addressing privacy of social security numbers
- Check State law

EMPLOYEE COMPENSATION – COMPLAINT PROCEDURE FOR IMPROPER DEDUCTIONS

- Employee will not lose exempt status if employer has a clearly communicated policy prohibiting improper deductions and a complaint procedure
- Policy must state that employer will not make prohibited deductions
- Policy is clearly communicated if published in Handbook or located on Company intranet
- Employer must inform employee who to report improper deduction to

EMPLOYEE COMPENSATION – EXEMPTION STATUS

- Categories of Employment explaining exempt v. non-exempt
 - March 13, 2014, President signed a memorandum directing the DOL to devise new overtime rules that would make more workers eligible for over time pay
 - New rules expected to increase the salary threshold from \$455/week
 - Proposed rule not expected until fall - stay tuned!

EMPLOYEE BENEFITS

- Health/Life/Disability Insurance
 - Reserve right to make modifications or changes to the plans at any time, including changes in benefits, coverage, carriers, employee contributions, premiums, co-payments, deductibles and/or elimination of the plans entirely
- Paid Time Off
 - Michigan Wage and Fringe Benefit Act
 - An employer shall pay fringe benefits to or on behalf of an employee in accordance with the terms set forth in a written contract or policy
 - Policy should state whether PTO paid upon voluntary / involuntary termination of employment

FMLA – FINAL RULES EFFECTIVE MARCH 8, 2013

- Qualifying Exigency Leave
- Military Caregiver Leave
- Serious Injury or Illness for a Current Servicemember
- Serious Injury or Illness for a Covered Veteran
- Required Information for Certification of a Qualifying Exigency
- Certification of Military Caregiver Leave
- Employee Eligibility Hours of Service and USERRA
- <http://www.dol.gov/shd/fmla/2013rule/comparison.htm>

FMLA – FINAL RULES EFFECTIVE MARCH 8, 2013

- Minimum Increments of Leave - CFR 825.205
 - Employer may not require employee to take more leave than necessary to address the circumstances that precipitated the need for leave
 - FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer
- Varying Minimum Increments - CFR 825.205
 - Employers must track FMLA leave using the smallest increment of time used for other forms of leave subject to a one hour maximum

FMLA – FINAL RULES EFFECTIVE MARCH 8, 2013

- Physical Impossibility – CFR 825.205
 - Physical impossibility provision is to be applied only in the most limited circumstances
 - Employer bears the responsibility to restore employee to the same or equivalent position as soon as possible
- Recordkeeping – CFR 825.500
 - Updated to specify the employer's obligation to comply with GINA
- Appendices – New Poster and Forms
 - Available at www.dol.gov/whd

FMLA – DEFENSE OF MARRIAGE ACT

- DOMA - Same sex spouses are “spouses” under federal law
- For FMLA leave, an employee can take leave for a serious health condition if the employee lives in a state that allows same sex marriage
- 17 states and the District of Columbia recognize the right of same-sex couples to marry
- Michigan – defines marriage as one man and one woman, bars joint adoption by unmarried people
- Ruling expected in DeBoer case pending before Judge Bernard Friedman, in the United State District Court, Eastern District of Michigan

NON-FMLA LEAVE

- EEOC and several courts have found that additional leave beyond 12 weeks of FMLA, may be a reasonable accommodation under the ADA
- Automatic termination policies may violate ADA
 - Automatic termination policies do not provide an outlet for engaging in interactive process to determine whether employee can return to work with a reasonable accommodation
- Depending on the size of the Company automatic termination after 12 months may be challenged by EEOC

NON-SOLICITATION/DISTRIBUTION POLICY

- Target's policy - prohibited employees at all times from "solicitation, distributing literature... if they are... [f]or commercial profit"
- NLRB - Prohibiting solicitation and distribution "at all times" for "commercial purpose" could be read as prohibiting solicitation and distribution for unions
- Absent special circumstances, cannot ban employee solicitation on company premises during non-working time, absent special circumstances
- Cannot infringe on employee's right to engage in the distribution of literature in the company's non-working areas during non-working times
- May generally prohibit solicitation by non-employees on company property

SOCIAL MEDIA ELECTRONIC COMMUNICATION POLICIES

- Unlawful prohibitions
 - Restricting disclosure of confidential information regarding wages or other terms and conditions of employment
 - Prohibiting posts that “harm” the Company
 - Prohibiting posts that are “inflammatory” or “controversial”
 - Prohibiting employees from using pictures, company logos or trademarks
 - Requiring management approval before employees can post on social media
 - Requiring employees to report social media posts of others
 - Prohibiting employees from contacting the media, government agencies or labor organizations
 - Prohibiting “inappropriate discussions”
 - Prohibiting “offensive, demeaning, or abusive remarks

SOCIAL MEDIA ELECTRONIC COMMUNICATION POLICIES

- Unlawful prohibitions
 - Prohibiting “offensive,. demeaning, or abusive remarks
 - Requiring that posts be “complete accurate and not misleading”
 - Prohibiting employees from commenting on “any legal matters”
 - Prohibiting “disparaging or defamatory comments

OWNERSHIP OF LINKEDIN PROFILES

Absent a policy to the contrary, an employee's LinkedIn account is not the property of the employer. *Eagle v. Morgan* (ED. Pa.)

ACKNOWLEDGEMENT

- Every employee should sign the acknowledgment
- New acknowledgments are necessary for new handbooks and major policy changes
- Should contain at-will, limitation periods, right to revise/amend policies
- Acknowledgement exhibit in litigation

TOP TEN HANDBOOK MISTAKES

- 10) Using a standardized or generic handbook
- 9) Relying on the disclaimer in your handbook that it is not a contract
- 8) Relying on non-contractual policies where a contract is necessary
- 7) Failing to provide employees with notification of updates or changes
- 6) Having a disciplinary policy that allows for deductions in pay

TOP TEN HANDBOOK MISTAKES

5) Having a mandatory performance evaluation policy

4) Flawed harassment policy

3) Probationary periods and mandatory progressive discipline

2) Not reviewing your policies periodically

1) Not following your policies

QUESTIONS?



THANK YOU!



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