

COMMONLY OVERLOOKED, BUT CRITICAL PROTECTIONS FOR YOUR BUSINESS

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“I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again.”

FBI Director Robert Mueller
RSA Cybersecurity Conference, March 2012

LAYERED BUSINESS SECURITY

- Leadership
 - Board of Directors
 - Chief Executive Officer, General Counsel
- Comprehensive policies & procedures (simplification key!)
- Establish & maintain cybersecurity program
- Provide budget & authority
- Assign responsibility
- Set the tone

SECURITY IS A TEAM EFFORT

- Board + CEO / General Counsel
- Management
- Information Technology (IT) Staff
- Human Resources (HR) Staff
- Risk Management
- Finance and Accounting
- Marketing
- Records and Information Management

SECURITY REQUIREMENTS



KEY SECURITY QUESTIONS

- Have you performed a risk assessment of your business?
- Do you have an actionable incident response plan?
- Have you trained your employees lately on cybersecurity?
- Have you updated your privacy policy?
- Do you have a recent terms & conditions on your site?
- Would you consider your business security aware?

- If you answered “NO” to any of these, why is that?

NIST CYBERSECURITY FRAMEWORK

Framework for Improving Critical Infrastructure Cybersecurity

Version 1.0

National Institute of Standards and Technology

February 12, 2014



INCIDENT RESPONSE PLANS

- Preparing for **WHEN** a business will be breached, not **IF** the business may be breached
- Words to live by: Identify & Protect + **Detect, Respond & Recover**

PRIVACY POLICY PRIMER

- Provides details about your company's views and procedures on the information collected from visitors
- Technically a legal document, but should be written in a way that a lay person can understand its contents
- Not something that can be thrown together in a day – requires consultation between company/lawyers
- Must contain certain information to comply with various state laws regarding information collection
- Should be published conspicuously on any company website once finalized

TERMS & CONDITIONS PRIMER

- Safeguards your company – legally binding contract
- Allocates respective rights, risks, and responsibilities
- Allows a company to own the content on a website
- One size does NOT fit all
- Limits the liability of your company
- Sets the governing law in case of a dispute
- Outlines prohibited activities on a company website

CYBERSECURITY INSURANCE

- Even with an incident response and cybersecurity tools in place, you should still consider cybersecurity insurance as a fail safe to protect your business from cyber risks
 - Standalone coverage usually
 - Helps companies recover faster from data loss owing to a security breach or other cyber event
 - Transfers some of financial risk of security breach
 - Investigate current coverage before you apply
 - Know the limitations of your coverage (likely will not cover theft of intellectual property)

HANDBOOK ESSENTIALS

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ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

HANDBOOK

- Why does my business need a handbook?
 - Sets forth legally mandated policies
 - Identifies the rules of employment and application of those rules
 - Expressly states employer's commitment to comply to with all laws
 - Expressly states expectation that employees comply with all laws

LEGALLY MANDATED POLICIES

- **Family and Medical Leave Act (FMLA)**
 - General Notice Required
 - If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically

LEGALLY MANDATED POLICIES

- **Fair Labor Standards Act (FLSA)**

- “Safe Harbor” Policy

- Employers can protect themselves from a collective overtime wage action for an improper deduction from a single exempt employee’s pay by: (1) establishing a clearly communicated policy prohibiting improper deductions; (2) establishing a complaint mechanism; (3) reimbursing employees for improper deductions in a reasonable time; and (4) making a good-faith commitment to future compliance
 - Employers may distribute this policy in written form directly to employees, on the company intranet, or in employee handbooks

LEGALLY MANDATED POLICIES

- **Occupational Safety Health Administration (OSHA)**

- Drug Testing Rule

- OSHA's 2016 final rule requires employers to “establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately,” to inform each employee of that procedure, of their right to make reports, and that there will be no retaliation for making such a report
 - Post-accident drug testing handbook policies must concisely lay out a reasonable reporting procedure, be distributed to all employees to inform them of the procedure and their right to make reports, and clearly articulate making a report will not result in any form of employer retaliation

LEGALLY MANDATED POLICIES

- **Equal Employment Opportunity Provision (EEO)**
 - The Equal Employment Opportunity Commission (EEOC) requires covered employers to give employees notice of their right to be free from workplace discrimination and retaliation
 - EEO handbook policies should expressly prohibit workplace harassment and discrimination

TROUBLESOME PROVISIONS

- **At-will employment disclaimer:** Failure to include or improper definition
 - General rule: Courts may hold an employer to express handbook provisions
 - Many employers fail to include an at-will disclaimer that expressly states that employment is “at-will,” that is, the employer or employee may terminate the relationship at any time, with or without notice, and with or without cause
 - Improperly defining the at-will relationship, or defining it in an overly broad manner, may destroy or limit an employer’s ability to make decisions in accordance with their expectations

TRoublesome Provisions

- **Progressive discipline procedures:** Including a policy
 - Including a progressive discipline policy is common, but may expressly limit an employer's ability to terminate an employee on an at-will basis
 - For employers who want to have truly at-will relationships with their employees, they should: (1) omit a progressive discipline policy; or (2) carefully draft a progressive discipline policy to clearly state that such policy does not limit in any way the employer's ability to terminate or discipline employees without adherence to any preconditions, including their own progressive discipline policy

NATIONAL LABOR RELATIONS ACT

- National Labor Relations Act (NLRA) covers most private sector employers
 - **National Labor Relations Board (NLRB) has jurisdiction over union and non-union workplaces**
 - NLRB has jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level
 - Federal or State governmental offices, the Federal Reserve Bank, employers subject to the Railway Labor Act, municipalities and religious organizations are excluded

NLRA: EMPLOYEE RIGHTS

- Section 7 of the NLRA gives employees the right to organize, strike, collectively bargain, and **engage in other protected concerted activity for the purpose of mutual aid and protection**
 - Concerted activity is much broader than union organizing
 - Section 7 grants employees the right to communicate about wages, hours, and any other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives
 - Such communication may occur at the water cooler or on social media

TRADITIONAL SECTION 7 TEST

- Conduct must be both protected and concerted
- Conduct must be protected by the NLRA
 - Right to Organize
 - Statements or activity regarding an employee's wages, working conditions or other terms of employment
- Conduct must involve concerted activity
 - Concerted activity occurs when “the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself”
 - “Where individual employees seek to initiate or to induce or to prepare for group action”

COMMON WAYS TO VIOLATE AN EMPLOYEE'S SECTION 7 RIGHTS

- Interfering with or restricting an employee's right to organize a union or join a union
- Retaliating against employees for engaging in protected concerted activity
- Disciplining employees for engaging in protected concerted activity

WHAT DOES THE NLRA HAVE TO DO WITH MY HANDBOOK AND WORK RULES?

- The NLRB has stated that **the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity**
- Thus, even if a rule does not explicitly prohibit Section 7 activity it will still be found unlawful if
 - Employees would reasonably construe the rule's language to prohibit Section 7 activity
 - The rule was promulgated in response to union or other Section 7 activity
 - The rule was actually applied to restrict the exercise of Section 7 rights

TARGETED HANDBOOK POLICIES AND WORK RULES

- In March 2015, the NLRB's Office of the General Counsel released a report concerning employer handbook rules
- This report stressed that the NLRB "does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act"
- The report laid out the "types of rules that are frequently at issue" before the NLRB, including
 - Social media rules
 - Confidentiality rules
 - Professionalism rules
 - Anti-harassment rules
 - Media communication rules
 - Logo, trademark, copyright rules
 - Photography and recording rules

SOCIAL MEDIA POLICIES

- A well-crafted social media policy can prohibit unprotected speech that could potentially harm an employer
- NLRB will strike over broad social media policies that generally monitor, analyze, and prohibit employee social media use
- It is lawful to prohibit insubordination, require courteous and respectful conduct, and require cooperation
- It is unlawful to restrict the right to criticize or protest employer's labor policies or employee treatment

ANTI-HARASSMENT POLICY

- Identifies prohibited types of harassment
- Clear complaint procedure (using “must”/“shall,” not “should”/“may;” identifies multiple management personnel to whom harassment may be reported)
- Articulates a clear commitment to maintain harassment free workplace and to investigate all complaints
- Includes a clear statement that those who file a good faith complaint or participate in an investigation will not be subject to retaliation
- Does not promise absolute confidentiality, rather, promises confidentiality to the extent possible and consistent with employer’s need to investigate

HR ADVANTAGE ADVISORY

- HR Advantage Advisory offers small and mid-size businesses robust outsourced human resource, risk management, and compliance solutions
- HR Advantage Advisory can function as a fully outsourced Human Resources solution for companies who might otherwise not be able to afford a full-time, certified HR professional
- HR Advantage Advisory can augment an existing HR department and perform the function(s) that either they don't like to do, or maybe they don't have the expertise to do (i.e. leave of absence management)
- www.hr-aa.com



QUESTIONS?



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OTHER RESOURCES

- www.clarkhill.com/contents/labor-employment-law
- www.clarkhill.com/contents/cybersecurity-data-protection-privacy
- www.hr-advantage.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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