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## **EMPLOYEE HANDBOOKS: How They Help And Hurt Employers**

*Presented by  
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# Presenters

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# OUR OBJECTIVES TODAY



- ▶ Discuss pro's and con's of handbooks
- ▶ Discuss legally required and core policies found in handbooks
- ▶ Discuss common policy drafting errors

# WORKPLACE EXPECTATIONS OF EMPLOYERS

- ▶ Employers:
  - Want acceptable performance and behavior from employees
  - Don't want to be handcuffed with inflexible policies or manipulative employees

# WORKPLACE EXPECTATIONS OF EMPLOYEES

- ▶ Employees:
  - Want to perform and behave in an acceptable manner
  - Don't want to guess at the employer's expectations or be treated unfairly

# IT'S A MATTER OF FAIRNESS

- ▶ THE IMPLICIT AGREEMENT BETWEEN EMPLOYERS AND EMPLOYEES:
  - We'll treat each other fairly
  - Fair treatment by the employer in exchange for a fair day's work by the employee

# WHY FAIRNESS IS IMPORTANT



Enhances morale

Improves quality of workforce

Enhances productivity

Reduces claims

Strengthens defense of claims and employer's credibility

Minimizes union organizing risks

# ANOTHER REASON WHY FAIRNESS IS IMPORTANT

Juries impose a standard of fairness:

- ▶ Even though the law does not require it for at will employees
- ▶ Most jurors (76%) are willing to ignore the law to reach a just and fair result

# HOW EMPLOYERS DEMONSTRATE FAIRNESS

1. Comply with employment laws
2. Apply concept of “Good Faith and Fair Dealing” (due process)
3. Follow policies and practices
4. Investigate objectively & thoroughly
5. Be consistent (treating similarly-situated employees the same)

# WHAT IS MEANT BY “GOOD FAITH AND FAIR DEALING?”

1. Did the employee know what was expected?
2. Was the employee put on notice of the consequences for not meeting expectations?
3. Was the employee given a reasonable period of time to meet those expectations?
4. Did the employee fail to meet those expectations?

# “GOOD FAITH AND FAIR DEALING” (CONT’D)

5. Did the employer adequately investigate all the relevant facts?
6. Was the employee given an opportunity to be heard before being disciplined?
7. Were the consequences appropriate to the circumstances? (Did the punishment fit the crime?)

# FIRST STEP OF FAIRNESS



## Communicating Expectations to Employees

# HOW EXPECTATIONS ARE COMMUNICATED TO EMPLOYEES

- ▶ Established written policies
- ▶ Supplemented by oral policies
- ▶ Supplemented by past practices
- ▶ Supplemented by “Rule of Reason”

# ESTABLISHED WRITTEN POLICIES

- ▶ Collected together
- ▶ Distributed to employees - normally in the form of an Employee Handbook!
- ▶ Ability to prove the employee was on notice of rules is a key factor in litigation (e.g., handbook receipt)

# PROS AND CONS OF EMPLOYEE HANDBOOKS

## ► CONS:

1. May create implied contract
2. Reduces flexibility to make exceptions
3. Involves time and money to write
4. Too many rigid rules handcuff employers and employees
5. Can't cover every possible situation

# PROS AND CONS OF EMPLOYEE HANDBOOKS

## ▶ PROS:

1. Communicate standard expectations
2. Increase consistent treatment
3. Provide support to supervisors
4. Increase appropriate behaviors
5. Comply with the law

# PURPOSES OF EMPLOYEE HANDBOOKS



1. Enhance consistent and fair treatment
2. Support for supervisors
3. Reference tool for employees
4. Build morale (internal marketing piece)
5. Communicate expectations

# PURPOSES OF EMPLOYEE HANDBOOKS (Cont'd)

6. Attract applicants (external marketing)
7. Help ensure compliance with laws
8. Maintain competitive position
9. Required by EPLI carrier
10. Promote employer's culture

# LEGALLY-REQUIRED POLICIES (ONLY 4 OF THEM)

1. EEO/Non-Discrimination
2. Harassment-Free Workplace
3. Family and Medical Leave (FMLA) (if applicable)
4. Drug-Free/Alcohol-Free Workplace (if government contractor)

# CORE POLICIES



1. Contract Disclaimer / Management Rights
2. Conflicts with State Law / CBA Provisions

# CORE EMPLOYMENT POLICIES



3. At Will Employment
4. EEO/Non-Discrimination\*
5. Disability Accommodation
6. Harassment-Free Workplace\*
7. Union-Free Philosophy

# CORE EMPLOYMENT POLICIES



8. Recruiting and Selection
9. Employment Categories
10. Introductory Period
11. Disclosure of and Access to Personnel Information and Records
12. Confidential Information (Employer's and Personal Identifying Info)

# CORE EMPLOYMENT POLICIES



13. Staffing Adjustments
14. Separation of Employment
15. Unemployment Compensation

# CORE COMPENSATION POLICIES

## 16. Pay Practices:

- a. Hours of work
- b. Meal and break periods
- c. Overtime
- d. Timekeeping
- e. Pay periods and paydays
- f. Deductions from pay
- g. Wage correction procedure

# CORE COMPENSATION POLICIES



## 17. Paid Time Off:

- a. Holidays
- b. Vacation (or PTO)
- c. Sick days (or PTO)
- d. Bereavement / Funeral days
- e. Jury duty pay
- f. Others

# CORE COMPENSATION POLICIES



18. Training and Education
19. Performance and Pay Evaluations
20. Performance Improvement Plans
21. Promotions, Transfers and Demotions

# CORE BENEFITS POLICIES

- 22. Benefits Disclaimer
- 23. Summary of ERISA-Covered Policies
  - a. Health insurance
  - b. Life insurance
  - c. Disability insurance (STD/LTD)
  - d. Flexible spending
    - (1) Medical reimbursement
    - (2) Dependent care reimbursement
  - e. Retirement

# CORE BENEFITS POLICIES



24. Summary of IRS-Related Policies:
- a. Tuition reimbursement
  - b. Relocation assistance
  - c. Adoption assistance
  - d. Travel and business expense reimbursement
  - e. Car, cell phone and PDA allowances

# CORE BENEFITS POLICIES

## 25. Other Fringe Benefits:

- a. Employee assistance plan (EAP)
- b. Voluntary supplemental benefits
- c. Others

## 26. Leaves of Absence

- a. FMLA\*
- b. Non-FMLA
- c. Military
- d. Others

# CORE EMPLOYEE RELATIONS POLICIES

- 27. Personal Appearance and Hygiene
- 28. Attendance
- 29. Outside and Self-Employment
- 30. Personal Relationships in the Workplace
- 31. Solicitation and Distribution
- 32. Use of Employer's Assets/Property

# CORE EMPLOYEE RELATIONS POLICIES

- 33. Electronic Media and Communications
- 34. Business Conduct / Code of Ethics
- 35. Personal Conduct / Work Rules
- 36. Discipline / Performance Improvement
- 37. Open Door / Internal Complaints
- 38. Alternative Dispute Resolution

# CORE SAFETY & HEALTH POLICIES



- 39. Fitness for Duty
- 40. Infectious and Communicable Illness
- 41. Work-Related Injuries
- 42. Light / Modified Duty

# CORE SAFETY & HEALTH POLICIES

- 43. Smoke-Free Workplace
- 44. Drug-Free and Alcohol-Free Workplace\*
- 45. Drug and Alcohol Testing
- 46. Violence / Weapons-Free Workplace

# CORE POLICIES



## 47. Handbook Receipt

# COMMON DRAFTING ERRORS



1. Failure to take applicable state law into account or to specify state law controls if it conflicts with handbook
2. Benefits overview language  
(formal plan document controls)
3. Politically-correct language
4. Inconsistent and/or conflicting provisions
5. Failure to preserve flexibility (e.g., “generally,” “usually,” “typically,” etc.)

# COMMON DRAFTING ERRORS – Harassment-Free Workplace Policy

- ▶ Doesn't cover all forms of harassment
- ▶ Doesn't prohibit retaliation
- ▶ Guarantees confidentiality or anonymity
- ▶ Inaccurate legal definition of harassment
- ▶ Doesn't mention that harassment by *both* employees and non-employees is prohibited

# COMMON DRAFTING ERRORS – Harassment-Free Workplace Policy

- ▶ Covers only unlawful behavior, not “inappropriate” behavior
- ▶ Reporting process does not include two alternatives
- ▶ Must include reasonable steps an employee can take to avoid being harassed
- ▶ \*\*\*Internal complaint policy must “carve out” harassment complaints

# COMMON DRAFTING ERRORS – EEO/Non-Discrimination Policy

- ▶ Failure to include all protected categories:
  - Race
  - Color
  - National Origin
  - Religion
  - Sex
  - Sexual orientation or preference (in some states, cities or counties)
  - Age (Federal protection is 40 and over)
  - Disability

# COMMON DRAFTING ERRORS – EEO/Non-Discrimination Policy

- Military Status
- Genetic information (Genetic Information Nondiscrimination Act)
- Marital Status (in some states)
- Ancestry (in some states)
- ▶ Failure to include harassment and retaliation
- ▶ Failure to include that reasonable accommodations will be made for disability and religion (unless undue hardship to the employer would result)

# COMMON DRAFTING ERRORS – FMLA Policy

- ▶ Inaccurate under current regulations
- ▶ Policy is more generous than what FMLA requires
- ▶ 12-month period for FMLA leave is improperly defined or undefined

# COMMON DRAFTING ERRORS – Other Leave of Absence Issues

- ▶ No discretionary / Non-FMLA leave policy (what if FMLA doesn't apply?)
- ▶ Too many LOA policies that conflict or are confusing
- ▶ Not understanding that workers' compensation and short-term disability are benefits, not leaves of absence

# COMMON DRAFTING ERRORS – Drug & Alcohol Testing Policy

- ▶ Failure to identify the types of testing that will be allowed
- ▶ Failure to identify the factors that will result in discipline/discharge
- ▶ Failure to reserve the right to discipline/discharge even if test results are negative if company has other evidence of a policy violation
- ▶ Failure to include a presumption of violation of the policy if the employee refuses to test

# COMMON DRAFTING ERRORS – Wage and Hour Issues

- ▶ Incorrect statement of when final wages will be paid (or what is included in final “wages”)
- ▶ Inadvertently counting paid time off as “hours worked” for overtime purpose
- ▶ Allowing compensatory time off in lieu of overtime
- ▶ Failure to have a working off-the-clock policy
- ▶ Failure to pay overtime if employee works unauthorized overtime and employer knows or should have known that overtime was being worked

# COMMON DRAFTING ERRORS – Wage and Hour Issues (Cont'd)

- ▶ Mixing calendar year, anniversary year, and pay period accruals for vacation and sick days
- ▶ Requiring both exempt and non-exempt employees to work both the day before and day after a holiday in order to qualify for holiday pay
- ▶ Failing to state that vacation, sick days, and other paid time off is calculated using the base rate of pay, up to maximum of 8 hours per day for full-time 8 hour employees and X hours per day for part-time employee

# Problem Tracking and Updating

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- ▶ Develop procedure for tracking questions / answers by policy
- ▶ Make available to all in HR who will likely run into the same questions
- ▶ Update with significant changes

# Questions and Answers



**Thank you for  
your time!**



**Thank you for your participation in the Employer Webinar Series.**

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