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## PROVISIONS OF AN EFFECTIVE EMPLOYEE HANDBOOK

By: [Sidney F. Lewis, V](#)

The following is the first of a two-part series.

### 1. Reasons to Have a Handbook

There is no law that requires you to have an employee handbook. Additionally, if you have a handbook, it does not necessarily follow that you will be in a better position to prevent or defend a lawsuit. So why go to the trouble?

First, every employer has employment policies and procedures, some in writing and maybe some not in writing. If you do not have a handbook, your policies are probably scattered in the form of memos to your employees or notices on your bulletin boards. They may also be in a binder collecting dust on a shelf in some manager's office. Some of your policies about how to deal with particular situations and issues may even be left to someone's memory about how things have always been handled.

The danger inherent in all of these scenarios, of course, is that nobody really knows what your policies are, and handling things in an inconsistent manner increases your risk of exposure in an employee lawsuit. If you take the time to consolidate your personnel policies in a thoughtfully crafted handbook, you will do a better job of making sure your employees know the rules and what is expected of them, and your supervisors will do a better job of keeping you out of trouble.

One of the first things we do for our new clients is to review their employee handbooks and bring them "up to speed." That is usually followed by training supervisors wherein contents of the handbook are explained, along with the legal relevance of each policy. This engrains the handbook into management's collective mind and also serves to educate them on the legal do's and don'ts.

### 2. Contents of the employee handbook

Many states have laws requiring the publishing of certain policies. Under federal law, if you have a handbook, you must have a Family and Medical Leave Act policy, and it is always imperative to have an anti-harassment policy. The following is a discussion of the policies we typically see when reviewing an employee handbook. Some policies are beneficial, some can be removed, and many may need to be revised to better protect you, the employer.

#### A. EEO Statement

This policy is usually in every handbook wherein the employer indicates it is an equal opportunity employer and makes all employment decisions without regard to race, color, religion, national origin, disability, age, etc. An EEO

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statement is not worth the paper it is written on if it is not actually practiced. Typically, however, there is a lot more language in an EEO statement than necessary. Employers tend to insert protections that are not required by the applicable state or federal law (*e.g.*, sexual orientation) and/or are only obligations that federal contractors must abide by (*e.g.*, veteran's status). The EEO statement should mirror the federal and state laws that apply to your particular operations.

## **B. Pre-Hire Information**

Provisions detailing requisite applicant qualifications and/or how applicants are processed are not necessary, since employees, not applicants, are the ones who receive the handbook.

## **C. Orientation/Probation Period**

Many handbooks provide for a 60 or 90 day probationary period. These policies are usually poorly worded. For example, some policies convey to employees that they can be terminated with or without notice or cause during the probationary period, thus implying that cause or notice is needed thereafter. In employment-at-will jurisdictions, this is clearly not the case, and thus should never be implied.

While probationary periods may have the practical effect of dissuading litigation from employees terminated shortly after their hire, they have no legal effect. From day one, employees are protected under almost every applicable federal and state employment law except for the Family and Medical Leave Act, which requires 12 months of service and 1250 hours of work. There may be waiting periods for health insurance, but that should be covered in the summary plan descriptions given to the employees. In sum, if probationary period policies remain in the handbook, they should never imply contractual rights once the probationary period has expired.

## **D. Access To Personnel Files**

In most states, an employer does not have to allow access to the personnel file. Access must usually be allowed for medically-related records, and public employers may have certain obligations under state law. Employers may want to shy away from publishing a policy on this subject, and if an employer is going to allow employees access to personnel files, such decisions should be made on a consistent basis, and employee reviews should always be monitored so that documents are not removed or tampered with.

## **E. Exempt/Non-Exempt Status**

Many times we see provisions in the handbooks where exempt and non-exempt status is defined and/or explained. This could be problematic given that many employers inadvertently misclassify some of their non-exempt employees as exempt. In order to avoid creating potential claims, the employer may want to

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remove any language regarding wage and hour definitions. What the employer should do is audit its wage and hour practices to ensure that it has correctly classified its employees as exempt or non-exempt.

## **F. Incentive Bonuses**

While on the subject of wage and hour matters, if employers have incentive bonus information published in the handbook, they must realize that these bonuses inflate the hourly rate for non-exempt employees and thus increase overtime liability. A lump sum incentive bonus is typically any lump sum bonus which has been communicated to the employee and awarded for attaining a performance or safety goal. Under the law, the incentive bonus must be folded back into the period of time it covered, which then has the effect of raising the average hourly rate of the employee for that period, and thus the overtime owed during that period.

## **G. Vacation Policy**

Many times employers use the word “accrued” in their vacation policies. This is dangerous. Vacation is either earned or not earned, and the wording of your vacation policy should track your state’s requirements as to whether you are legally obligated to pay earned but unused vacation upon termination of employment. In many states earned vacation cannot be forfeited; it must be paid upon termination, regardless of the reason for the termination. In other states, your policy and/or past practice control what you must do. Also, clarity problems may be present if the initial earning of vacation is on an anniversary basis, and there is a subsequent conversion to a calendar year basis. In sum, your vacation policy must be clearly and concisely worded so that there is absolutely no confusion as to how much vacation an employee is entitled to during employment and at the termination of employment.

## **H. Holidays**

Most employers provide that paid-for-holidays must be accompanied by attendance on work days prior to and subsequent to the holiday. This is standard practice. Also, under federal law, paid holidays never have to be counted as actual hours worked for the purposes of determining overtime liability for that week.

## **I. Health Insurance Information**

Too many times we see detailed health and welfare benefits information in an employee handbook. This is dangerous because an employee may be able to rely on information in the handbook – even when the specifics of the benefit plans have changed. Any reference to health or welfare benefits in a handbook should be as brief as possible. All employees must receive summary plan descriptions detailing these benefits, and thus the employer should rely solely on the summary plan descriptions to educate its employees on these benefits and keep any mention of ERISA-covered benefits in a handbook to a bare minimum.

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of ERISA-covered benefits in a handbook to a bare minimum.

## **J. Sick Leave**

Sick leave should only be what it purports to be — paid time off if the employee is sick. If employers fold sick leave into vacation for the creation of PDO (paid days off) or PTO (paid time off), sick leave may be due and owing upon termination if required by your state. In states where earned vacation is due upon termination, paid sick leave is generally not due, so it is important that sick leave is clearly defined and differentiated from vacation or other personal paid time off.

## **K. Family and Medical Leave of Absence**

The FMLA policy is mandatory if you have a handbook. How it is worded may also affect your ability to effectively govern FMLA absences and your defenses if legally challenged. Your FMLA policy should establish a rolling 12-month period. If your policy states “any 12-month period,” for example, then the Department of Labor and the courts will probably take the position that the 12-month period is either a fiscal, anniversary, or calendar year, whichever benefits the employee. Also note that if you do change your calculation period, you must give a 60-day grace period before implementation.

The FMLA policy should detail the rights and obligations of both the employee and the employer. You may also want to post the policy on the bulletin board. This is one of the more important policies in your handbook.

## **L. Other Leaves of Absence**

If you provide other leaves of absence, such as personal or maternity leave, you need to make sure that you reference the FMLA policy and the fact that all other leave runs concurrently with FMLA, if applicable. With regard to personal leaves, you always want to have language noting that reinstatement to the same or similar position is not guaranteed, and that you reserve the right to place an employee in any position you deem appropriate and available.

## **M. Maternity Leave**

Many states have mandated maternity leave for employees, and, unlike the FMLA, employees do not usually have to be employed for any particular time period to be eligible. Whatever your mandated leave is, you should make sure that you recite it succinctly and note the fact that it runs concurrently with any applicable FMLA leave.

## **N. Military Leave**

Employers should be careful in putting too much detail in the military leave policy, given that the law tends to change fairly frequently. It may be

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sufficient for the employer to just state that they comply with all state and federal military leave laws, and make sure your HR personnel have a good understanding of both the employer's and the employees' rights and obligations.

## **O. Jury Duty Leave**

Some states require that the employer pay employees while on jury duty leave, other states require minimal payment, and many states simply require that the employer protect an employee's job while on jury duty leave. Whatever your state's requirement, your jury duty policy should accurately reflect the obligations of both the employer and employee.

## **P. Funeral Leave**

Funeral or bereavement leave is a gratuitous policy and not mandated by state or local law. However, given different bereavement practices in different areas of the country, it is important for the employer to specify exactly what it is willing to pay for vis-a-vis the arrangement of and attendance at the funeral, and the category of family members who qualify for said leave.

(Next issue: Harassment, Discipline and Internet Usage Policies, among others.)



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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

**Sidney F. Lewis, V**  
**Labor & Employment Practice Group Leader**  
Jones Walker  
201 St. Charles Avenue  
New Orleans, Louisiana 70170-5100  
504.582.8352  
504.589.8352 (fax)  
[slewis@joneswalker.com](mailto:slewis@joneswalker.com)

### Jones Walker's Labor & Employment Attorneys

H. MARK ADAMS<sup>1</sup>  
JENNIFER L. ANDERSON<sup>3</sup>  
NORMAN E. ANSEMAN, III  
TIMOTHY P. BRECHTEL  
SUSAN K. CHAMBERS  
LAURIE M. CHESSE<sup>2</sup>  
AMY C. COWLEY  
JENNIFER L. ENGLANDER  
REBECCA G. GOTTSEGEN  
VIRGINIA WEICHERT GUNDLACH  
JANE H. HEIDINGSFELDER  
CORNELIUS R. HEUSEL

THOMAS P. HUBERT  
JOSEPH R. HUGG  
MARY ELLEN JORDAN  
TRACY E. KERN  
JENNIFER F. KOGOS  
JOSEPH F. LAVIGNE  
SIDNEY F. LEWIS, V  
CHRISTOPHER S. MANN  
OLIVIA S. REGARD  
RICHARD R. STEDMAN, II  
PATRICK J. VETERS  
ROBERT B. WORLEY, JR.<sup>3</sup>

<sup>1</sup> Also admitted in Mississippi  
<sup>2</sup> Also admitted in Florida

<sup>3</sup> Also admitted in Texas