

Legal Risks Lurking in Your Employee Handbook

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A well-drafted employee handbook reduces legal risks and clearly communicates the company's rules and policies. However, poorly-drafted policies can undo the benefits of a handbook and, even worse, may subject you as the employer to liability. Below are examples of common issues in employee handbooks that may seem innocuous on the surface but pose legal risks to employers.

Boilerplate Policies Not Tailored to the Business

Although it may be tempting to copy template handbook policies from the internet, such policies may be inconsistent with federal, state, and local laws, recent changes in the law, and your company's unique workplace culture and practices. A handbook has little value when it is not tailored to your business needs or when your policies are inconsistent with your company's practices.

Because employment laws are constantly changing, it is crucial that you remain informed of legal developments and frequently revisit your handbook to ensure your policies are always consistent with the current law and your workplace practices. Accordingly, you should consult legal counsel when drafting, revising, and updating your employee handbook.

Failing to Include Important Disclaimers

Employee handbooks should include a disclaimer that nothing in the handbook is intended to create a contract of employment, modify the at-will employment relationship, or require progressive discipline prior to terminating an employee.

Handbooks should also state that the employer has the right to modify the handbook at any time. Such disclaimers allow you to maintain flexibility in issuing discipline and implementing changes to the handbook.

Non-Compliant Background Check Policies

Before including a background check policy, you should determine whether the federal Fair Credit Reporting Act (FCRA) applies. The FCRA generally applies when an employer uses a third party to conduct a background check on a job applicant or an employee. The FCRA does not only apply to credit checks. Background reports covered by the FCRA may also include driving records, criminal history reports, and education and employment verifications, as well as many other records.

A background check policy in a handbook does not satisfy the FCRA. The FCRA sets forth several procedures employers must follow, including providing certain disclosures and obtaining a prior, written authorization from the employee or applicant. The disclosures and authorization must be in a separate document and may not be included with other policies. Violating the FCRA exposes employers to significant potential liability, including civil litigation and statutory penalties ranging from \$100 to \$1,000 for each individual violation.

Unclear or Inconsistent Reporting Procedures

Not only are policies prohibiting harassment, discrimination, and retaliation an essential part of a handbook, they can also be a key piece of evidence in an employment lawsuit. It is therefore extremely important that the handbook provides detailed and clear procedures for employees to report harassment, discrimination, and retaliation. The handbook should identify the specific person to whom the employee should report the misconduct and an alternative person in the event the designated person is the alleged offender or is unavailable. You should also ensure that the handbook's reporting procedures are consistent with the reporting procedures discussed in trainings and related materials. When properly drafted and implemented, such procedures may provide you with a legal defense should a lawsuit arise.

Including Contract Provisions

Employee handbooks should not include contract provisions, such as non-compete agreements, non-solicitation agreements, or arbitration agreements, because such provisions conflict with the handbook's disclaimer that the handbook is not a contract and may be modified at any time. Such disclaimers have proven problematic for employers seeking to enforce contract clauses in handbooks. For example, Texas courts have held that language allowing the employer to unilaterally modify the handbook renders an arbitration clause in the handbook unenforceable. Thus, you should include contract provisions in separate, written agreements with your employees.

Failing to Address Applicable State and Local Laws

You also need to ensure your handbook is consistent with the applicable laws, which can vary significantly from state to state and city to city. For example, last year, the city councils in Austin and San Antonio passed ordinances that would require employers to provide paid sick leave to employees. Both ordinances have faced legal challenges, including a court ruling last November declaring that the Austin ordinance is unconstitutional. To date, neither ordinance has taken effect. Multi-state employers face additional challenges because their policies must comply with the laws of each state where their employees work. Many state laws differ with respect to issues such as mandated rest and meal breaks, minimum wage and overtime pay, paid time off, wage deductions, drug testing, background checks, weapons in the workplace, and restrictions on activities outside the workplace. Therefore, you need to stay informed of changes to state and local laws and revise your policies when necessary.