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Employee Handbooks: Out with the Old, In with the New

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Every employment lawyer has had the experience of asking a client for a copy of her employee handbook, only to be given an old, coffee-ring stained document, cobbled together in different typefaces, only partially contained in a three-ring binder.

Don't let that happen at your company. Of course, it is tempting for busy human resources professionals to assign a low priority to a handbook update, given the time spent on reductions in force, requests for leave, changes to benefit plans, and handling employee complaints. But courts, legislatures, and enforcement agencies ensure employment laws change constantly. Take a look at your employee handbook and ask yourself who was president when it was last updated. If the answer doesn't start with the letter "O," it's time.

Even if you think your handbook is up-to-date, a number of employment law developments this year should be reflected in your policies. Below is a review of some of the subject matter in a handbook that should be reviewed and, if necessary, revised.

New FMLA regulations

The federal Department of Labor revised the Family and Medical Leave Act regulations significantly in January 2009 (and to a more limited extent, just recently). The DOL requires employers provide each employee a notice of their FMLA rights in a handbook or a handout at the time of hire. Therefore, it is especially important to update this policy to conform with the newest requirements. Revisions concern everything from call-in policies to the

entirely new servicemember leave provisions.

Work Schedules

California law generally requires payment of daily overtime. There is a narrow exception for certain "alternative workweek" arrangements. The Legislature recently changed the statute governing these alternative scheduling programs, which may make it easier to avoid paying daily overtime in certain circumstances.

Vacation Accrual

California law is settled that employers cannot implement forfeitures of earned vacation. But a recent court decision clarifies employers' flexibility to determine how and when vacation is earned. For example, employers may specify that employees must work a certain amount of time before beginning to earn vacation. Employers also may grant vacation in a lump sum after a period of service. The key is to have a clear policy explaining how much vacation employees earn and when it accrues.

Commissions and Bonuses

Both commissions and bonuses are considered wages in California. Earned wages must be paid timely. However, the employer has the right to prescribe how and when commissions and bonuses are earned. The California Supreme Court recently reaffirmed employers' right to specify an employee must work for a period of time to earn a bonus. Other courts have ruled that commissions may be earned upon the occurrence of certain events.

As with vacation policies, however, such plans must be clear. If commissions and bonuses are explained in the handbook, this is a good time to review those policies to ensure they are enforceable.

Genetic Discrimination

A recent federal law, the Genetic Information Nondiscrimination Act (or "GINA") now prohibits discrimination on the basis of genetic information. Your employee handbook should include genetic information as a protected basis in the EEO policies. If your company for some reason requires employees to provide information covered by GINA, ensure policies are modified to comply with the new law.

Trade Secrets and Non-Compete Agreements

A handbook should contain very clear policies regarding confidentiality of competitive business information, even if the organization has a separate confidentiality agreement. Without actually revealing trade secrets in the handbook, a confidentiality policy should leave no doubts about what information you consider sensitive and critical to your business.

In addition, because data storage devices are larger in capacity and smaller in size, policies should be updated to include restrictions on the use, copying, and disclosure of electronic information. The law protects employers against unauthorized access, but the employer must specify which persons and

activities are unauthorized and which are not.

Unfortunately, it is easy for employers to go too far to protect confidential information under California law. California courts this year have repeatedly rejected policies prohibiting solicitation of customers and employees. Yet, the courts require employers to make reasonable efforts to protect any information the employer considers to be a trade secret. Walking the line between effective and unlawful protection means these policies must be carefully reviewed by subject-matter experts.

Workplace Privacy

Employees who work under the obvious watch of security cameras may not easily claim an invasion of privacy if they are caught engaging in misconduct on tape. That is because it is not reasonable to expect privacy in public. On the other hand, employees in private or semi-private offices may have a higher expectation of privacy. The California Supreme Court this year authorized employers to conduct monitoring to the extent it does not infringe on employees' privacy rights.

Similarly, employees may have privacy expectations in their use of company computers and other systems, such as PDAs. Yet, employers have good reason to monitor computer usage for improper activities such as accessing "adult" materials, inappropriate emails, etc. A rule expressly prohibiting the use of company-owned IT for personal profit or competing business interests can help enforce a trade action if it should become necessary. Personal use also

can be limited to prevent unnecessary strain on bandwidth.

The best way to manage employees' privacy expectations is by providing adequate notice of monitoring. The handbook is one way to disseminate that notice via a comprehensive monitoring policy.

Social Networking and Blogging

Employees' use of Facebook, Twitter, and etc. has exploded. Employees also blog about personal information or other matters important to them. Employers generally cannot limit when employees do during personal time. However, employers may wish to implement policies limiting employees' access to such sites during work time and what employees may publicly disclose about their work and management. Additionally, to avoid disclosure of confidential information or other possible policy violations, employers should have a clear policy regarding employees' posts to work-related blogs.

Internal Investigations

Employers must increasingly conduct workplace investigations to address claims of discrimination or "whistleblowing." The courts expect investigations as part of a proper response employee complaints. There have been a number of decisions regarding the adequacy of investigations and the consequences for failing to conduct them properly.

Although handbooks need not spell out details regarding an employer's investigation policy or procedures, handbooks should make clear employees are expected to cooperate with investigators by making

themselves available and answering questions honestly. In addition, every handbook should include a no-retaliation policy and explain the avenues for complaining about suspected retaliation.

Acknowledgment of Receipt

A revised handbook should include the revision date. Also, each employee should sign an acknowledgement of receipt of a new or revised handbook. The acknowledgment should have the date of receipt as well as the latest revision date.

The acknowledgment should disclaim that the handbook creates contractual rights. (If a handbook were an employment contract, you might not be able to update it unilaterally, which means you would have to apply different policies to employees depending on their date of hire.) The acknowledgment also should specify policies may be modified only in writing, and that the policies in the new handbook supersede the old ones. And, if applicable to private-sector, non-union employees, the handbook should say that the employment relationship is "at will."

Wrap Up

A good employee handbook clearly explains to employees the employer's expectations. It also may include information that will help new employees adjust to new employment and foster a positive work experience. Not every new decision or regulation requires a whole new handbook. However, employers should ensure handbooks contain up-to-date policies reflecting the current state of the law

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