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Handbook Tips: Is Your Handbook Legally Sound?

Speaking to a packed audience at the annual SHRM Conference & Exposition, Christine V. Walters, MAS, JD, SPHR, began her presentation by listing the pros and cons of maintaining an employee handbook. As pros, she listed consistency in application so that employees in like circumstances are treated equitably, provides clarification, ensures consistency, and provides an introduction for new employees. As cons, Walters discussed how handbooks, if not drafted well, can be used against an employer, can create an implied contract, and can defeat at-will employment.

"The key," she said, "is policy versus procedure. In other words, you must pay attention to the differences between what you write or use the handbook to say and what you actually do."

With that in mind, Walters discussed how to develop or improve upon various handbook sections and what they should be used for.

Introduction and disclaimer. "The introduction portion of any handbook should be used to highlight the company's history. Tell the reader who you are and take the opportunity to brag," Walters said. "Tell the reader why it's so fabulous to work for you."

The disclaimer portion should be used to articulate that what the employee is reading does not constitute a contract with ABC Company and that the employee is in an at-will relationship with ABC Company.

EEO and harassment prevention policy. "Should an EEO charge be brought against your organization, attorneys will often ask first for a copy of your handbook," Walters told attendees. "So, in it, you will want to discuss protected classes, affirmative action, and unlawful harassment."

Specifically, Walters said your handbook should list who the protected classes are at the federal, state, and local levels, and include a catch-all phrase such as *'or any other status or class protected under federal, state or local law.'* "This will let the reader know that your intention is to protect all employees from violations of EEO laws," said Walters.

Handbooks already in existence may need to be updated to protect associations as well as to reflect the ADA Amendments Act of 2008 (ADAAA). As for association, Walters suggests updating your language to read something like the following: *'We prohibit discrimination and harassment based on a person's actual or perceived age, race, religion, etc. The above also applies to any employee or applicant with whom the employee associates.'* And, to ensure the ADAAA is reflected

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in your handbook, Walters suggests updating to read as follows: *'We provide equal opportunities for all and do not discriminate against an individual with a disability in accordance with the ADA and the ADAAA.'* Walters recommends speaking with legal counsel to ensure these changes are sufficient for your organization.

"As for unlawful harassment, your handbook should prohibit all forms of harassment; not just sexual harassment," Walters said. In addition, she told attendees that handbook harassment provisions should include the following:

- All third parties (e.g., contractors, vendors, etc.);
- Behavioral examples, including email as was suggested by the EEOC;
- A list of reporting resources (The EEOC recommends that these resources be outside the employee's chain of command, for example, HR.);
- A no-retaliation provision including witnesses;
- A discussion of the difference between confidentiality and privacy — you cannot promise confidentiality to an employee in a harassment case because you have to find out the details of what happened, but confidentiality can be provided by an EAP, for example, though you must make clear that reporting harassment to an EAP is not the same as reporting to an employer;
- A consideration of association and perception; and
- A statement that no false claims will be accepted.

"Regarding the no false claims statement, be sure to write that in a manner that does not have a chilling effect," Walters told attendees. "Just because an employee can't produce any evidence doesn't mean he or she wasn't harassed."

Social media. "When it comes to addressing social media in your handbook, you will want to be sure to consider the NLRA," Walters told attendees. "To comply, be sure to focus on employee activity on employer time and resources. As long as your language is directed to that point, you should be okay."

"You will also want to consider privacy issues in your statement," she continued. "Therefore, to avoid the risk of bringing up employee privacy concerns, use language that focuses on company time and company property, tie the policy regarding off duty conduct to business operations, and keep a close eye on state surveillance laws as there are a number of states with laws that limit or restrict employers' ability to survey employees electronically."

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Paid and unpaid leave. "If you are a covered employer, and if you have a handbook, an FMLA policy must be included in your handbook," said Walters. "In addition, if you have a military leave policy in your handbook, make sure it is USERRA compliant. For example, USERRA requires you to reinstate an employee for up to five years after his or her service ends to the job he or she would have had had he or she not been on military leave. This includes all promotions, merit pay, etc. Upon return, these employees are no longer at-will employees for six months or one year following return except for cause depending on length of service. Your handbook must account for these rules."

Vacation, sick, PTO, etc. Walters encouraged attendees to ensure that any vacation, sick, PTO, etc. policies included in a handbook address the following:

- When does leave begin to accrue and at what rate does it accrue or is it front-end loaded?
- Do you allow for rollover?
- Do you cap or put a maximum on leave accrual?
- Are you going to pay out leave at termination? Note that this is sometimes dictated by state law.

Employment status, hours, and pay. Walters told attendees to ensure their handbooks address the following as it relates to employment status, hours, pay, and the like:

1. *Attendance.* Employees should be expected to call in each day they will be absent where a length of absence has not been pre-determined. And watch out for no-designee statements in your handbook. One court, for example, has ruled that under the FMLA, employees are allowed to have a designee call in.
2. *Direct deposit.* The issue here lies with whether direct deposit is offered or required. If you have a policy requiring direct deposit, it may be okay, but it may not be depending on state law.
3. *Employment status.* As of now, no state has defined the difference between full- and part-time work, so employers may do so in the handbook. However, watch for gaps in hours. For example, do not define part-time employees as those working between 0 and 29 hours and full-time employees as being those working between 31 and 40 hours. This does not account for the 30th hour and leaves a gap that could cause you problems.
4. *Exempt vs. non-exempt.* Make sure all employees are properly classified and consider doing your audit with a worksheet. This provides you, the employer, with good documentation and is also a good example of due diligence.
5. *Regular vs. introductory.* While it's fine to have an introductory period in the employment relationship, keep in mind that courts do like the portion of handbooks that talk only about "we will monitor your performance for 90 days." This can be read to create an implication that something will change in the employment relationship on the 91st day. To account for this and provide clarity, consider focusing on the distinction between eligibility for certain benefits during the introductory period and after.

This article is a sample of the variety of resources (including sample policies) available on the

Healthcare HRAnswersNow database located on the Medical Mutual website – www.medicalmutualgroup.com

To access HRAnswersNow, sign in as a member/policyholder (contact the top administrator at your facility).

Once you are on the Members Home page, click on 'Access Healthcare HRAnswersNow.'

General handbook tips

In conclusion, Walters offered attendees the following general tips that could serve to clean-up a handbook and guarantee its legality:

- Rather than referring to employees' "personal appearance," try "professional appearance" instead.
- Don't create an expectation of privacy for employees while they are on your organization's property.
- Before you regulate or prohibit smoking, be sure to consult with state laws.
- Regarding solicitation and distribution of literature, define where, when and by whom such actions can be taken.
- Be sure your handbook includes a reference to *accessed* voicemail, email, and Internet. Policies typically only include a reference to documents or messages sent, received, created or stored. Including "accessed" could be a big deal.
- Find places that it could be beneficial to change "will" to "may." This will create flexibility for the employer.

Editorial note: *The information provided by Ms. Walters is for general use. It is not specific to any one organization and should not be thought to constitute legal advice. Any questions regarding the legality of your employee handbook should be brought to the attention of your organization's legal counsel.*

Source: "Employee handbooks: read 'em and weep?," presented on June 27, 2011, by Christine V. Walters, MAS, JD, SPHR.