

Employee Handbooks: What You Need To Know

Presented to PIHRA by:

Greg S. Labate, Esq.

Practice Group Leader, Labor & Employment
Sheppard, Mullin, Richter & Hampton LLP

Introduction

- Simply put, there is no more important document for an employer than its employee handbook.
- A well written, updated, concise, and user-friendly handbook is the most powerful weapon in the employer's arsenal to protect itself from employee morale issues and frivolous employment litigation.
- Employers need to understand the strategic importance of the handbook, and pay proper deference to the drafting, distribution, and enforcement of the policies contained therein.

The Purpose of the Handbook

- One purpose of the handbook is to provide employees with a specific statement of the employer's policies, and offer clear guidance as to how they can be “good citizens” of the company.
- An equally important purpose for the handbook is to protect the employer by documenting the employer's compliance with the law and providing a legal defense to potential employee claims.

What The Handbook Should Not Be

- The handbook should not be all things to all people.
- It should not attempt to set forth every single policy and procedure for every employee of the company for all possible scenarios.
- For example, it should not include specialized procedures used by one particular department.
- Rather, employers should distribute a "Procedures Manual" to select departments for that purpose.

What The Handbook Should Not Be

- It should not be a massive ton of paperwork that is the dumping ground for everything the employer wants to communicate to the employees.
- It should also not set forth policies that only apply to a few select employees; that is what memos are for.

What The Handbook Should Be

- It should be a clear and concise statement of the company's important policies and legal defenses that generally apply to all employees.
- It should be the one document both employees and their supervisors turn to when they have questions about the basic terms and conditions of their employment.

When/How To Review?

- It is absolutely critical to conduct an overall review of the employee handbook every year to ensure compliance with both state and federal law.
- It is a simple fact that employment law, especially in California, changes quite frequently and often significantly (i.e., recent paid sick leave laws).
- Accordingly, employers must be vigilant and carefully monitor the ever-evolving state of the law, and be ready, on short notice, to revise their policies to be legally compliant.

When/How To Review?

- We strongly recommend that only very experienced labor counsel review/draft the handbook.
- Given the fact that this handbook could be the basis for the employer's legal defense to a multi-million dollar lawsuit, it is worth the small investment to make sure it does not contain any illegal policies.

Best Practices

- Electronic distribution and acknowledgment of receipt of the handbook can be problematic.
- We recommend the distribution of a hard copy of the handbook to all employees.
- There is nothing better than an original signature on an acknowledgment form.
- Retain the original signature page in the employee's personnel file.

Best Practices

- Always be sure to date the version of the employee handbook distributed to the employees, both in the footer/header of the document and in the acknowledgment form.
- Typically, employee handbooks should be no more than 25 pages long; employees will most likely not read anything much longer, and no jury would expect them to.

Best Practices

- They should contain a table of contents at the beginning and an index at the end.
- They should be organized in a way that makes sense thematically, i.e., not simply alphabetized by policy name
- The most important policies should be at the beginning.
- For example: at will, discrimination, harassment, retaliation, complaint procedures, etc.

Introduction

- Be sure to state that the company reserves the right to modify, delete or add provisions to the handbook from time to time, with the exception of the at will employment policy.
- If you want to set forth the history of the company, keep it very short or include in a cover letter instead.

At Will Employment

- This is the most important policy, so be sure to get it exactly right!
- Ensure that it properly defines the at will status.
- Identify the one person by position, not name (i.e., CFO, President, etc.) who has the right to modify the at will policy, but only in writing.
- Include an express statement that there may be no implied or oral agreements that in any way modify the at will policy.
- And be consistent: either at will or at-will, not both!

Discrimination/Harassment

- Ensure that the policies against discrimination and harassment contain all the protective classes, including the most recent ones.
- Include the new prohibition against discrimination based on religious dress and grooming.
- How many protected classes are there currently under California law?

Discrimination/Harassment

EIGHTEEN!

Discrimination/Harassment

- **Race**
- **Color**
- **Ancestry**
- **National Origin**
- **Citizenship**
- **Age**
- **Physical/Mental Disability**
- **Pregnancy**
- **Religion**
- **Religious Dress/ Grooming**
- **Gender**
- **Gender Identity**
- **Gender Expression**
- **Sexual Orientation**
- **Marital Status**
- **U.S. Military Status**
- **Political Affiliation**
- **Genetic Characteristics**

Reasonable Accommodation

- Include a policy that states the company will engage in the required interactive process with the disabled employees that determines the proper and reasonable accommodations for their disability.

Introductory Period

- Have an introductory period, which is typically 90 days.
- Do not call it a “Probationary Period” since it implies a change in status after it is completed.
- Determine whether the company will allow employees to accrue benefits during the introductory period, except for those required by law (i.e., new paid sick leave, insurance under ACA).
- Clearly state that the employee does not progress from the introductory period until the employer notifies the employee in writing.

Employee Status

- Include a disclaimer in the employee status section that says the status of an employee will not change unless the employee is specifically informed of such change in writing.
- This statement will prevent part-time and temporary employees from claiming they were somehow transformed into full-time employees with benefits purposes just because they worked additional hours in a given pay period.
- Note: There was a multi-million dollar class action due to the omission of this one simple sentence.

Workweek/Workday

- Be sure to define the beginning of the workweek and the beginning of the workday for purposes of calculating overtime.
- It can begin at any time you want, but be consistent.

Off The Clock Work

- Include a policy strictly prohibits non-exempt employees from working “off the clock” without pay.
- Include a rule that if employees are asked to work off the clock and not record their time worked in any way, they must immediately notify management in writing.
- State that employees who work off the clock and/or supervisors who require or permit their employees to work off the clock will be subject to disciplinary action, up to and including termination of employment.

Meal/Rest Periods

- Employers should review/update their meal and rest period policies, since they are at the heart of most class action lawsuits.
- Make sure you include the language “4-hour period, or major fraction thereof” in rest period policies.
- Rest period policies should set forth a complaint procedure for employees who are not authorized and permitted to take their rest period.

Meal/Rest Periods

- List all the situations where employees are entitled to be provided with a meal period, including the second meal period.
- Define a “meal period” to be an uninterrupted duty-free break that is at least 30 minutes long.
- Include a requirement that employees must complain to management in writing if they are not properly provided with a meal period under the law.
- State that employees will be disciplined for not allowing meal/rest periods where allowed by law.

Certification Forms

- Note: Employers should use certification forms wherein employees verify that they have been authorized and permitted to take their rest periods and have been provided with meal periods, as well as that they have not worked off the clock, been paid for all overtime, etc.

Intellectual Property Issues

- Include a section on confidential information, and define in detail what information is deemed to be confidential.
- Explain what must be done with confidential information when it is discarded.
- Remind employees that they are not to use any confidential information that belongs to a former employer in their current duties.

Intellectual Property Issues

- Consider including a detailed section on intellectual properties, including a reference to California Labor Code Section 2870.
- Include a policy that employees are not allowed to solicit employees for a period of one year after they separate from the company.
- Note: It is important to include this non-solicitation provision in the handbook (or in a standalone agreement) because there are no statutory laws that provide this protection absent a written agreement.

Company Property

- In order to avoid invasion of privacy claims, include a detailed policy that employees have no expectation of privacy in any company property.
- Identify precisely what company property is included in this definition, including computers, telephones, cell phones, fax machines, pagers and other electronic systems.

Company Property

- Include a detailed policy concerning the use of the Internet, email, and electronic communications.
- Incorporate policies against sexual harassment, discrimination, and retaliation relating to the use of such electronic communications.

Social Media

- The use of social media in the workplace is one of the most controversial issues in employment law at this time.
- Employers should not rely on common sense when drafting social media policies because the law does not make any logical sense in this area.

Social Media

- For example, one would assume that an employer could have a policy that prevents employees from badmouthing the company on social media sites, but that may be illegal under the NLRA.
- The NLRB has recently issued guidelines concerning proper social media policies in the workplace, and the limitations placed on employer policies in this area is astounding.
- Note: Check with the NLRB and labor counsel before instituting any such policies.

Fraternization

- Include a policy that states that the company prohibits any romantic and/or sexual relationship between employees, whether or not there is a direct or indirect reporting relationship between the employees.
- Reserve the right to evaluate the employment status and take appropriate action, including transfer or termination.

Dress Code And Appearance

- Review these policies to make sure they do not include any dress code and/or appearance policies that discriminate against an employee's gender, race, religion, etc.
- Note: New rules prohibiting discrimination based on religious dress and/or grooming.

Workplace Violence

- It is important to have a clear "zero tolerance" policy against any workplace threat and/or violence.
- This policy will be helpful if the employer needs to get a restraining order against an employee.
- Note: Restraining orders can be a useful strategic tool in preventing employee litigation.

Standards of Conduct

- List the conduct that would lead to discipline and/or termination.
- However, be sure to clearly state that this list is not exhaustive, and there are other types of misconduct as well.
- State that there is no requirement that the employer use progressive discipline before termination.
- Be sure to add a statement that this policy does not alter the at will nature of employment.

Grievance Procedure

- Set forth a detailed policy concerning the process employees must follow to file formal grievances with the company.
- Identify each step of the process, and the position to which the employee should complain at each level of grievance.
- It is recommended that employers have at least three levels of review.
- Consider a fourth level of review by a neutral factfinder outside of company.

Grievance Procedure

- Be sure to include a statement that if the complaint is with the person they are supposed to report to, they can skip that step.
- Note: Be sure to exclude from this policy any complaints of illegal conduct, such as discrimination, harassment, or retaliation, as employers should not require employees to go through this step-by-step grievance process for these types of claims.

Separation Pay

- Call it separation pay, not severance pay, to avoid ERISA Plan issues.
- Include a policy that states the company does not guarantee separation pay to employees.
- Clearly state that if the company provides separation pay, the company will require employees to sign a release of all claims.

Vacation

- California law does not allow employers to have a "use it or lose it" vacation policy.
- However, employers can have a reasonable accrual cap for paid vacation.
- We recommend that the reasonable accrual cap be 2X the annual accrual rate.
- Include a provision that states the employer has the right to schedule an employee's vacation at its discretion.

Vacation

- Upon termination of employment for any reason, all accrued but unused vacation must be paid out immediately at the employee's final rate of pay.
- Note: Any "floating holidays" must be treated as a paid vacation day.

Medical Leaves

- The interplay between the various medical leaves (FMLA, CFRA, PDL, WC, etc.) is extremely complicated, and should be carefully analyzed.
- Be sure that the policies comply both with the federal FMLA and the California CFRA.

Pregnancy Disability Leaves

- Be sure the policy complies with SB 299.
- Became effective January 1, 2012.
- Requires employers to maintain and pay for insurance coverage for employees on pregnancy disability leave.

Other Leaves

- Lactation accommodation
- Alcohol and drug rehabilitation leave
- Military duty leave
- Military spouses and/or domestic partners leave
- Bereavement leave
- Jury duty leave
- Court proceeding leave
- Domestic violence leave
- Sexual assault leave

Other Leaves

- Crime victim leave
- Voting leave
- Child school activities leave
- Suspended pupil leave
- Emergency civil service leave
- Volunteer firefighting training leave

Other Leave Related Policies

- Include a statement that all leaves are unpaid unless expressly indicated otherwise and/or required by law.
- State that any leave does not count as hours worked for the purpose of computing overtime or benefits, unless otherwise required by law.
- Include a section regarding offsets concerning leaves.

Other Leave Related Policies

- State that if two or more leaves of absence overlap, it is the company's intention to limit the employee to the time available under the single most favorable leave policy.
- Specifically include language that any leave that is taken by an employee under any policy that could have been taken under any other policy, will be credited against the maximum established leave.
- This policy prevents employees from "double dipping" on leaves of absence.

Paid Sick Leave: Introduction

- The Healthy Families, Healthy Workplace Act
- January 1, 2015 requirements:
 - Posters
 - Update Labor Code 2810.5 notice for new hires
- July 1, 2015 requirements:
 - Accrual begins
 - Written notice complete
 - Wage statement tracking

Paid Sick Leave: Entitlement

- An employee working in California, on or after July 1, 2015, for 30 or more calendar days within a year, is entitled to paid sick leave.
- Note: Applies to temporary, part-time and full-time employees.
- Paid sick leave accrues at the rate of one hour per every 30 hours worked.
- Paid at the employee's current rate of pay.
- Accrued paid sick leave must carry over to the following year, but may be capped at either 48 hours or 6 days, whichever is greater.

Paid Sick Leave: Usage

- May begin using accrued sick leave on the 90th calendar day of employment.
- An employee may use paid sick leave for:
 - Themselves or a family member for the diagnosis, care or treatment of an existing health condition or preventive care, and/or
 - An employee who is a victim of domestic violence, sexual assault, or stalking
- Employer may limit use at 24 hours or 3 days per year, whichever is greater.

Paid Sick Leave: Lump Sum

- As an alternate to the standard accrual rate, employers can instead provide a “lump sum” of 24 hours or 3 days, whichever is greater, at the beginning of each calendar year, anniversary date or 12-month basis.
- Under this “lump sum” method, employer is not required to carry over sick leave to the next year
- But employers still must track and display usage on wage statement or other written document.
- This is the big conundrum: accrual or lump sum??

Paid Sick Leave: PTO

- The PTO policy will be compliant if it provides both the same hours for usage and for the same purposes as outlined in the new paid sick leave law.
- The PTO policy must be in writing.
- Employers may offer more time and usage than required by the new paid sick leave law, but not less.

Paid Sick Leave: Rate

- Same as the employee's "regular rate" of pay.
- But if an employee is paid commission or piece rate, then you divide the total compensation for the previous 90 calendar days by the number of hours worked and pay this rate.

Paid Sick Leave: Separation

- An employer is not required to pay out accrued, unused paid sick days at the time of termination, resignation or retirement.
- But if an employee is rehired within one year, previously accrued and unused paid sick days must be reinstated.
- If employer has a separate PTO policy, a final payout of PTO is due at separation.

Paid Sick Leave: Record Keeping

- Retain all records documenting hours worked and paid sick days accrued and used by each employee for three years.
- Provide employees with written notice on pay day that sets forth the amount of paid sick leave available to the employee.
- Failure to maintain or retain adequate records creates a rebuttable presumption that the employer violated the law.

Paid Sick Leave: No Retaliation

- Employers cannot retaliate against employees who:
 - Use sick leave
 - File a complaint with the Labor Commissioner
 - Allege a violation of these rights
 - Cooperate in an investigation or prosecution regarding paid sick leave
 - Oppose a policy or practice prohibited by this law

Paid Sick Leave: No Retaliation

- Prohibits an employer from:
 - Denying the right to use paid sick leave
 - Discharging or threatening to discharge
 - Demoting; Suspending
 - Discriminating against an employee
- Note: there is a rebuttable presumption of retaliation if the employer acts in a manner described above within 30 days of the employee's request for paid sick leave.

Paid Sick Leave: No Retaliation

- If an employer takes any of the prohibited actions, the employee may be awarded:
 - Reinstatement if terminated
 - Lost wages if suspended or terminated
 - Removal of any disciplinary action from personnel file
 - A civil penalty of up to \$10,000 per violation
- Employer may also be required to post a notice to all employees about the retaliation.

Paid Sick Leave: Penalties

- An employee need only assert that the paid sick leave was for a covered purpose in general terms
- An employee may recover:
 - An administrative penalty equal to the paid sick leave x 3 or \$250, whichever is greater, but not more than \$4,000
 - \$50 penalty per day for each day the violation occurred or continued
 - \$50 penalty per day until the violation is corrected

Paid Sick Leave: Policies

- **WARNING!**
- The new paid sick leave law has wreaked havoc with existing paid sick leave and PTO policies.
- Consider going back to separate policies for vacation and sick leave instead of one PTO policy.
- Be sure to have very experienced labor counsel draft it for you.
- This is guaranteed to be an area for class action lawsuits in the future, so tread carefully.

Misc.

- Add anti-bullying policy.
- Add “free food” policy.
- And what about arbitration?

Acknowledgement Form

- Restate the at will employment policy in **BOLD CAPITAL LETTERS**.
- Have the employee sign and date the acknowledgement form, and retain a copy in the employee's personnel file.
- Question: What if the employee refuses to sign the acknowledgement of receipt form?

Acknowledgement Form

- Ensure that the acknowledgement form specifically states that the employee has received and read a copy of the handbook, and agrees to abide by it.
- Always including the specific date of the version of that employee handbook.
- List the key policies on the form itself.
- Have the employees agree that if they violate any of these policies, they could be subject to disciplinary action, up to immediate termination.

Any questions?

Thank you for attending.

Greg S. Labate

glabate@sheppardmullin.com

Direct: (714) 424-2823