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EMPLOYEE HANDBOOKS

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- I. EMPLOYEE HANDBOOKS PROVIDE A USEFUL METHOD OF COMMUNICATING EMPLOYEE POLICIES TO EMPLOYEES**
- A. Handbooks help employers inform employees of company policies and provide a means for consistent enforcement of company rules.
 - B. In some instances employers are required to provide certain information to employees, and a handbook provides an efficient vehicle for accomplishing that task.
 - 1. For example, the Family and Medical Leave Act requires employers to inform employees of their rights and responsibilities under the Act.
 - 2. The Uniformed Services Employment and Reemployment Rights Act requires employers to notify employees of their rights under the Act.
 - C. Investigative agencies, such as the Equal Employment Opportunity Commission and the Virginia Employment Commission, expect employers to have policies which address the subject of agency investigations, such as equal opportunity, harassment, and discipline.
 - 1. The same is true of jurors and judges, who anticipate that an employer's policies will specify what course of action will be taken by an employer in particular situations.
 - 2. The absence of such policies may raise questions and create unnecessary suspicion from agencies, jurors, and judges that an employer's decisions were subjective and perhaps discriminatory.
 - D. Well-drafted handbooks help raise employee morale.
 - 1. Employees appreciate knowing what to expect.
 - a. Employee benefits, as well as rules and policies, should be included in the handbook.

- b. With many questions answered in an employee handbook, employees are less likely to seek the aid of a union.
 - 2. The better employee morale, the more productive the workforce.
- E. In addition to raising employee morale, handbooks can reduce the likelihood of lawsuits.
 - 1. Employees are less likely to sue when they can view clearly-stated policies which are evenly applied to all employees.
 - 2. Employers may use employee handbooks to help prove that an employee was appropriately disciplined for violating a company policy.
 - a. Employees who have signed a receipt stating they have received and reviewed an employee handbook have a difficult time denying knowledge of rules and policies contained in the handbook.
 - b. An appropriate disclaimer that an employee is employed "at-will" helps refute employee claims to the contrary.
- F. For most employers, the benefits of having an employee handbook clearly exceed any possible downside.
 - 1. Employees can always claim an implied contract arising from handbook language, but the Virginia Supreme Court has held that written policies with appropriate disclaimers can help refute such claims.
 - 2. Poorly written handbooks could have the unwanted effect of reducing management flexibility, but properly drafted handbooks can provide employers with a vehicle to assert management rights in various contexts.

II. EMPLOYERS SHOULD PROTECT AGAINST EMPLOYEE HANDBOOKS CREATING CONTRACTUAL RIGHTS FOR EMPLOYEES

- A. Employers face some risk that language in an employee handbook may be used as evidence of implied contractual obligation.
1. The Virginia Supreme Court has impliedly ruled that an employee handbook could constitute an employment agreement, under certain narrow circumstances.
 2. Also, a number of other courts in Virginia have ruled that employees may have rights due to statements or promises made in employee handbooks.
 - a. In *Frazier v. Colonial Williamsburg Foundation*, 574 F. Supp. 318 (E.D. Va. 1983), an employee sued his former employer in part due to statements in an employee handbook which the employee claimed created enforceable promises. A local federal judge recognized that such a theory was enough to allow a jury to decide whether or not the employee should recover.
 - b. In another federal court decision in Virginia, *Barger v. General Electric Co.*, 599 F. Supp. 1154 (W.D. Va. 1984), a judge found that an employee handbook and other circumstances could have created a contract which was breached by an employer during a reduction in force.
- B. Virginia employers should be careful to avoid language in handbooks which might create a contractual obligation.
1. Include express statements or disclaimers, specifying that the handbook does not create a contract, and require the employee to acknowledge receipt and understanding of this disclaimer through his/her signature.
 - a. The Virginia Supreme Court has ruled that an employee's acknowledgement, on a printed form, of his at-will employment status defeated a claim for contract liability based on a handbook. *Progress Printing Co. v. Nichols*, 244 Va. 337 (1992).
 - (i) The Court has also ruled that such a disclaimer, included in an employee

handbook, precludes any implied contract based on handbook provisions. *Graham v. Central Fidelity Bank*, 245 Va. 395 (1993); see also *Willey v. Roanoke County*, 70 Va. Cir. 307 (Roanoke 2006).

- b. Disclaimers should be placed in the introduction and in a receipt to be signed by employees.
 - (i) This receipt should be retained in the employee's personnel file.
 - (ii) Sample introductory disclaimer. "This employee handbook should not be confused with an employment agreement. Because employment at our company is based upon mutual consent, the right of the employee or the company to terminate the employment relationship 'at-will' is recognized and affirmed as a condition of employment, and therefore, employment may be terminated by either party at any time for any reason. Any statements or promises to the contrary should not be relied upon by any prospective or existing employee."
2. Under no circumstances should the signature of the employer's President, CEO, or any other management representative appear anywhere in the handbook.
- a. The Virginia Supreme Court has ruled that employment contracts are typically subject to the Virginia Statute of Frauds, which, among other things, requires a writing, signed by the party against whom a contract is to be enforced, for the formation of a valid contract.
 - b. This means that handbooks should not create enforceable contracts absent some signed document to memorialize the alleged agreement. *Falls v. Virginia State Bar*, 240 Va. 416 (1990).
3. The key in writing an employee handbook is to maintain flexibility for management to make employment decisions it determines are appropriate.

4. Make sure that any statements contained in an employee handbook are accurate.
 - a. Do not promise anything you do not intend to deliver.
 - b. Make sure the policies set forth in the handbook are enforced.
5. Retain the right to modify anything contained in the handbook at any time.
6. Do not use statements that imply "permanent" employment or employment for a specific period of time.
 - a. Avoid use of the words "permanent employee" ("regular employee" is a better term).
 - b. Words such as "career," "long-term employment," etc., should also be avoided.
 - c. Avoid promises of job security or job tenure.
7. Do not otherwise limit management's flexibility in disciplining employees.
 - a. Avoid lists of reasons for discipline that are apparently all-inclusive.
 - b. Provide flexibility for management to choose appropriate disciplinary measures.
 - c. Be sure that disciplinary policies contemplate that certain situations may call for action other than according to progressive discipline.
 - d. Avoid promises to comply with any particular discharge procedure or to terminate an employee only for "just cause."
 - e. Avoid promises to attempt to rehabilitate unsatisfactory employees.

III. OTHER CONSIDERATIONS IN DRAFTING AND MODIFYING EMPLOYEE HANDBOOKS

A. Consider eliminating or modifying any "probationary period" section.

1. The implication of a typical probationary period is that once completed, employee is entitled to more job security than the law otherwise provides.

a. If an employee may be discharged for any reason during a probationary period, is the employer limited in discharging an employee after completion of a probationary period?

(i) Avoid this implication.

2. If a probationary period is maintained, you might mention that employee will be reviewed more often during this period.

a. Consider re-naming the probation period, calling it a "try-out" period.

b. Make it clear that management will not be limited in reasons for discharging an employee during or after probationary period.

c. Be careful not to state that a "probationary" employee becomes a "permanent" employee at the end of a probationary period.

d. Consider shortening your probationary period to thirty days as well as clarifying that surviving this period will not affect the "at-will" nature of employment.

(i) The quicker the decision, the less the expectation of continued employment after the introductory period.

(ii) Because unemployment compensation responsibility does not attach to a new employee until 30 working days are completed, this will have the additional benefit of

eliminating unemployment compensation for discharging incompetent employees in Virginia.

- (iii) Finally, supervisors will find it easier to make objective termination decisions early in the employment process, rather than after an employee has been around long enough to form relationships or other sentiment.

B. Make sure your employee handbook contains a section describing your discipline policies.

1. Be sure to state that the reasons listed for disciplinary action are not all-inclusive.
 - a. It is virtually impossible to predict all the reasons which might justify some form of discipline.
2. Avoid other standard phrases such as "good cause" or "sufficient cause" as these words imply standards that must be met before disciplinary action may taken.
 - a. Do not use such terms as "fair" to characterize anticipated treatment.
3. Some form of progressive discipline is advisable.
 - a. But expressly maintain flexibility to alter progressive disciplinary steps when circumstances so warrant, even if that means "skipping" disciplinary stages and proceeding directly to termination.

C. All methods of communication between management and employees should be stated and encouraged.

1. Open communication is good for employee morale and provides an outlet for employee complaints short of litigation.
 - a. Consider an "open-door" policy.
 - b. Consider some type of grievance procedure. The EEOC may ask an employer whether a disciplined or discharged employee had an avenue of appeal.

- D. Include a section on your company's EEO policy.
 - 1. All protected classes recognized under the law should be included.
 - a. For example, make sure that your EEO policy includes verification that disabled employees (and applicants) will not be discriminated against and that military status will not be considered in employment decisions.
 - b. There is no requirement to include classes of employees not currently protected under the law.
 - 2. Anti-Harassment policies are a must.
 - a. In certain circumstances, employers who adopt and enforce effective policies against harassment may use such policies as affirmative defenses to lawsuits for harassment in violation of Title VII.
 - b. As a result, the EEOC, courts and juries expect responsible employers to have such policies.
- E. Include language on permissible pay deductions under the FLSA and an employee complaint procedure to address any pay discrepancies or questions. This will help in taking advantage of the FLSA "Safe Harbor" provision.
 - 1. Under the Safe Harbor provision of the FLSA, if improper deductions are erroneously made by the employer, an employee won't lose exempt status if employer has a clearly communicated policy that prohibits improper deductions and sets forth a clear complaint procedure.
- F. If you have a severance pay policy, make sure it is clearly stated in the handbook.
 - 1. Virginia law does not require any particular severance pay policy.
 - 2. Consider treating employees who resign after giving appropriate notice better than the employee who does not give any notice.

- a. Likewise, you might consider treating the employee whose job is eliminated differently from the employee who is fired for misconduct.
- 3. Employers should be aware of the potential for ERISA coverage of severance policies.
 - a. In essence, the more elaborate and highly structured the severance plan, the greater the risk of ERISA coverage, which carries with it specific employer requirements for disclosure and reporting.
- G. List and discuss all company benefits.
 - 1. Careful attention to accuracy will avoid later problems.
 - a. It is surprising how many employees do not know what benefits they are receiving.
 - b. Employee lawsuits over accrued benefits are often due to confusion on the part of the employee.
 - 2. Care should also be taken to retain the flexibility for the employer to change or terminate any aspect of benefits in the future.
 - a. This should include flexibility to change carriers or providers of certain benefits as well as the level of benefits.
 - b. Employers are not obligated to state precise benefit levels or costs in a handbook, and many chose not to do so to avoid revising the handbook each time a benefit changes.
 - c. Remind employees in the handbook that benefits provided by contract with third parties are governed by the terms of those contracts, which may change from time to time.
 - 3. Be sure to keep your handbook updated as to any changes in the law or in benefits.

4. Employers should realize that while a summary of benefits should be included in the handbook; the handbook is not a substitute for the Summary Plan Description required for benefit plans falling under ERISA.
- H. Include a section on internet/online social networking use.
1. Consider the appropriate use restrictions based on your business needs.
 2. Prohibit harassment, discrimination, defamation, and the disclosure of confidential information.
 3. Emphasize the lack of privacy when using company computers for email and internet purposes.
 4. Identify improper conduct, such as viewing sexual or other inappropriate online material.
- I. Employee handbooks should be reviewed, revised and updated periodically.
1. Such a review should be done carefully with advice of your lawyer.
 2. Make sure all employees receive notice of changes, preferably with a revised copy of the handbook.
- J. Again, make sure employees sign receipts which are maintained in their personnel files.
1. This receipt should indicate that the employee received, reviewed and understands the employee handbook.
 2. The receipt should also contain each employee's agreement to abide by the handbook's terms.
- K. For examples of sections which may be included in an employee handbook, see the attached Sample Table of Contents (Appendix A).

APPENDIX A

SAMPLE TABLE OF CONTENTS

- I. WELCOME
- II. HISTORY OF THE COMPANY
- III. SOME VERY IMPORTANT POLICIES
 - Equal Employment Opportunity
 - Anti-Harassment
 - At-Will Employment
 - Try-Out Period
- IV. KEEPING IN TOUCH
 - Bulletin Boards
 - Employee Activities
 - Employee Meetings
 - Exit Interviews
 - Grievance Procedure
 - Newsletter
 - "Open-Door" Policy
 - Performance Evaluations
 - Suggestion Awards
- V. ABOUT YOUR JOB
 - Advancement
 - Attendance
 - Breaks and Rest Periods
 - Computer Use Policy
 - Confidentiality
 - Conflicts of Interest
 - Customer Relations
 - Discipline & Discharge
 - Dress Code
 - Electronic Mail
 - Employee Classifications
 - Employee Identification
 - Employment Agreements
 - Employment Records
 - Employment Referrals
 - Employment of Relatives
 - Energy Conservation
 - Use of Internet and Social Networking Sites
 - Job Bidding

- Lost and Found
- Lunch and Coffee Breaks
- Medical Examination
- Personal Phone Calls
- Promotions and Transfers
- Resignation
- Smoking and Eating
- Substance Abuse and Testing
- Telephone Use
- Tools
- Unions
- Visitors
- Work Reductions

VI. PAY PRACTICES

- Call-In Pay
- Garnishment of Wages
- On Call Pay
- Pay Day
- Payroll Deductions
- Complaints or Inquiries About Your Pay
- Rate of Pay
- Severance Pay
- Shift Differential
- Time Records
- Tips
- Working Hours and Overtime

VII. COMPANY BENEFITS

- Family and Medical Leave
- Bereavement Leave
- Bonus Plan
- Education Assistance and Training
- Employee Discounts
- Benefits and Employee Rights and Obligations
- Holidays
- Insurance Benefits
- Jury/Witness Duty
- Leave of Absence
- Loans and Credit Unions
- Long Term Disability
- Military Leave
- Parking
- Payroll Savings Profit Sharing Plan
- Retirement Plans
- Service Awards

- Sick Leave
- Uniforms
- Vacation Leave
- Workers' Compensation
- Your Social Security Benefits

VIII. STANDARDS OF CONDUCT

- Minor Offenses
- Major Offenses
- Drug and Alcohol Use

IX. SAFETY PROCEDURES AND PRACTICES

- Accidents
- Be Safety Conscious
- Company Vehicles
- Evacuation Plan
- Fire Prevention
- Safety Program
- Security Rules

X. CONFIRMATION OF RECEIPT OF PERSONNEL MANUAL