

Top 10 Employee Handbook Mistakes to Avoid

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Taking A Boilerplate Approach/ Not Updating Handbook

Taking A Boilerplate Approach/Not Updating Handbook

- Avoid downloading a standard handbook and using it as your own
- Your handbook should reflect that actual practices and policies of your company
 - Each company is unique and your handbook should be modified accordingly
 - Examples:
 - Leave
 - Benefits
 - Compensation

Omitting Disclaimers

At-Will Employment, Contract Disclaimer, and Reservation of Rights

- Handbooks may impose contractual obligations upon employers
- At-will and contract disclaimers must be prominent and clearly state:
 - The employer reserves the absolute right to fire anyone without cause at any time; and
 - The handbook contains no promise of any kind by the employer and the employer remains free to change the policies, procedures, benefits and other programs without having to consult with anyone and without anyone's agreement
 - The employer may change its policies from time to time and that the employer reserves the right to do so unilaterally and without notice
 - The handbook supersedes, replaces, and overrides any and all previous handbooks.

Example of an At-Will Disclaimer

This Handbook is not a contract, express or implied, guaranteeing employment for any specific duration. Although the Company hopes that each employee's employment relationship will be long term, the Company may terminate this relationship at any time, with or without cause or advance notice. Employees may also terminate this employment relationship at any time. This is known as employment "at-will" and all of the Company's employment relationships and policies in this Handbook are based on this premise. Please understand that no supervisor or representative of the Company has the authority to enter into any agreement with you for employment for any specified period or to make any promises or commitments contrary to the foregoing.

At-Will Employment and Contract Disclaimer

- Recommended that disclaimers be incorporated into the following sections of the handbook:
 - Introduction;
 - Discussion of probationary period (if any);
 - Complaint resolution and/or progressive discipline policy;
 - Rules and regulations;
 - Employee benefits;
 - Termination policy; and
 - Acknowledgment form

Broad Social Media Policies

Social Media Policies

- Why are they necessary?
 - Significant risk of disclosure, confidential proprietary, trade secret information
 - Defamation and harm to reputations
 - Addresses employee use of social media both at and outside of the workplace
- However, the NLRB has imposed broad protections for employee conduct on social media



Broad Confidential Proprietary Information Policies

Confidential and Proprietary Information Policy

- Scope of confidentiality agreements varies by industry
- Policy should include:
 - Employee acknowledgment of employer's interest in protecting the information;
 - Types of information and records considered confidential; and
 - Possible consequences for improper disclosure
- NLRA Section 7 disclaimer
 - “Nothing in this policy is intended to restrict employees from discussing the terms and conditions of their employment, including compensation, or from engaging in any other protected concerted activity.”

Applying Policies Inconsistently

Applying Policies Inconsistently

- Inconsistent application of company policies can lead to discrimination claims
- Ensure that policies are well written to avoid misinterpretations and confusion
 - Review handbook for ambiguous language
- Management should be trained to apply policies consistently

Restrictive Disciplinary Policies

Code of Conduct / Discipline

- Policy should address:
 - The purpose of developing the policy
 - Types of conduct the company considers inappropriate
- Progressive discipline?
 - Easy to consistently enforce
BUT
 - Often fails to provide flexibility to skip steps in process
- Possible consequences



Not Addressing State Laws

Addressing State Law with Employees in Multiple Jurisdictions

- Local Practices Approach
 - One handbook covering all employees
 - Handbook includes a “Local Practices” section detailing applicable state/local laws
 - OR
 - Handbook drafted in compliance with all states
- Separate Handbook Approach
 - Entirely separate handbooks
 - Coordinate with legal counsel to ensure all potential legal and regulatory issues can be anticipated and addressed



Not Tailoring Your EEO Policy

Equal Employment Opportunity (EEO)

- EEO policies usually address:
 - Prohibited forms of discrimination under federal, state, and local law
 - e.g., Title VII, ADA, ADEA
 - Personnel actions governed by the EEO policy
 - Harassment
 - Reporting procedure



Not Tailoring Your Wage and Hour Policies

Wage and Hour Policies

- **Work Hours / Workweek**
 - Often governed by federal, state, or local law
 - Length of workweek, required work days, daily working hours, changes in work schedules
- **Rest / Meal Breaks**
 - Federal or state law may impose requirements
- **Regular Pay Procedures**
 - Normal and alternate pay dates, how employees are paid, required / voluntary deductions, procedure for reporting/correcting payroll errors

Wage and Hour Policies

State Wage Payment Laws

- Many wage payment issues are governed by state law
- The method and frequency of paying wages, the deductions from wages, and the payment of wages to separating employees are usually governed by state law



Internal Inconsistency

Internal Inconsistencies

- It is important to ensure that the different policies in the handbook don't conflict
- Examples:
 - FMLA policy, paid leave policy, and attendance policy that aren't consistent in how/who to provide notice to in the event of an absence
 - Handbook states in the beginning that employees are at will and can be terminated or may quit at any time without notice, but in attendance policy requires employees provide 2-weeks notice before quitting

Conclusion

Questions?



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Proactive Measures to Mitigate Workplace Woes

WORKPLACE DISCRIMINATION

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Affirmative Action Plans

- Coverage
 - Women and Minorities: 50 or more employees AND:
 - A contract of \$50,000 or more,
 - Bills of lading totaling \$50,000 or more, or
 - Is a financial institution that is an issuing and paying agent for US savings bonds and notes in ANY amount.
 - Protected Veterans: 50 or more employees and a contract of \$150,000 or more.
 - Individuals with Disabilities: 50 or more employees and a contract of \$50,000 or more.



Affirmative Action Plans

- What is Affirmative Action?
 - Availability comparison
 - Good faith efforts
- What Affirmative Action is Not
 - Quota system
 - Unreasonable requirements



Affirmative Action Plans

- Preparation and Document Retention
 - Opportunity to Self-Identify
 - Race
 - Gender
 - Disability Status
 - Protected Veteran Status
- Disability Self-ID Form
- Retention of Plans



EEO-1 Reporting Requirements

EQUAL EMPLOYMENT OPPORTUNITY

Coverage

- 100+ Employees
- Certain Federal Contractors with 50 or more employees



Purpose

- Used by the EEOC to investigate charges of employment discrimination
- Provides the government information about the employment status of minorities and women



Preparation and Document Retention

- Which employees must be included?
- How to classify employees into categories?
- How to file?



Questions?

- Koley Jessen's Employment Team is happy to assist with your affirmative action and EEO reporting needs!



Employment Practices Liability Insurance

EPLI COVERAGE

What is it for?

- Employment practices liability insurance (EPLI) protects against claims arising from the employer-employee relationship.
- It helps protect the company against claims that arise from the job application process to employee termination.



What types of claims are covered?

- Sexual harassment.
- Wrongful termination.
- Discrimination based on protected categories.
- Retaliation.
- Failure to promote.
- Defamation or libel.
- Invasion of privacy.
- Employment-related misrepresentation.



How does it work?

- Usually written on a claims-made basis.
- Timely notice of a claim is critical.
- Upon reviewing the incident and determining that it falls within the scope of the policy, the insurer will either retain counsel to fight the claim or, far more likely, attempt to settle it.



How to make it work best for your company?

- Consider paying more for coverage of complaints made by third parties.
- What amount of coverage is right for you?



Questions:



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They Said WHAT? Employer Policing of Off-Duty Social Media Activity

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Roadmap

- Importance of This Issue
- What Laws Could Apply
- Case Studies
- Takeaways

Why This Issue Is Important

- Imagine it is August 2017 and you manage a restaurant on the West Coast.
- Seemingly out of nowhere, the restaurant's Yelp and Facebook pages are overrun with comments and criticisms.
- You then learn that all of this unwanted attention is all because one of your employees has been identified as a participant in the “Unite the Right” rally in Charlottesville, Virginia based on photos posted on Twitter.
- What can this employer do?

Why This Issue Is Important

- Before 2004, employers were generally unaware of what employees did outside of work.
- Today, however, the omnipresence of social media has given employers an unprecedented inside view of the personal lives of their employees.
- Employers must grapple with what to do with all of this information.

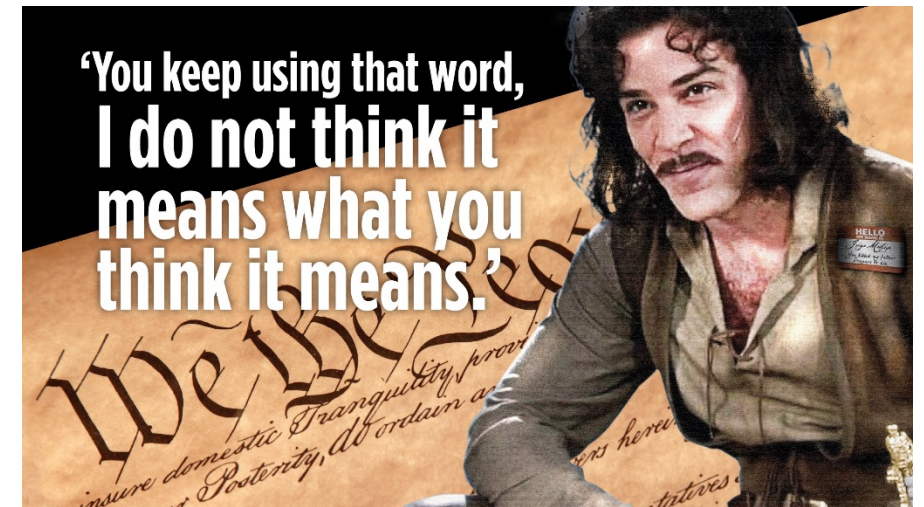


What Laws Are Implicated?

- There are several laws that may be implicated when an employer makes a decision based on an employee's off-duty conduct, including social media activity:
 - State and local “off-duty conduct” statutes;
 - Title VII and Section 1981;
 - The National Labor Relations Act; and
 - Common law defamation.

What about the First Amendment?

- The First Amendment does not apply to private business (absent special circumstances).
- An employee's right to free speech is not implicated when a private employer takes action based on the employee's social media activity.



States Extending the First Amendment

- Although the First Amendment does not apply to private businesses, Connecticut and Utah have expressly or practically extended its protections to private businesses.
- For example, Utah protects an employee's:
“lawful expression or expressive activity outside of the workplace regarding the person's religious, political, or personal convictions ...”



Case Study

- For “public” employers (and employers in Connecticut) that are subject to the First Amendment, that does not mean an employee’s social media activity is 100% immune from consequences at work.
- For example, in *Carr v. Dep’t of Transportation*, an employee was terminated for a Facebook post that ended with the following comment:

*“I end this rant saying I don’t give a flying [****] about those babies and I will gladly smash into a school bus[.]”*

Off-Duty Conduct Laws

- A number of states have enacted laws that protect employees' legal off-duty conduct, including: California, Colorado, Nevada, New York, and North Dakota.
- In addition, a number of states, including Nebraska, protect an employee from discrimination or retaliation based on his or her political activities.

Case Study: *Patterson-Eachus v. United Airlines, Inc.*

- Plaintiff was employed by United Airlines for 31 years, starting in 1986.
- In August 2017, Plaintiff posted several controversial images and videos to her private Facebook page.
- The posts were made on her personal time from a personal computer.
- A number of Plaintiff's subordinates believed the posts were "racially insensitive" and were offended by them.

Case Study: *Patterson-Eachus v. United Airlines, Inc.*

- In late August 2017, a subordinate filed an internal complaint about Plaintiff's conduct, including, but not limited to the Facebook posts.
- After an investigation, United Airlines terminated her employment on October 16, 2017.
- Plaintiff filed a lawsuit asserting numerous claims, including violations of Colorado's Lawful Off-Duty Activities Statute and political activity statute.

Case Study: *Patterson-Eachus v. United Airlines, Inc.*

- The Court granted summary judgment on all claims except the Lawful Off-Duty Activities and political activity claims.
- In denying summary judgment on these claims, the Court emphasized that the termination letter noted “Plaintiff posted ‘inappropriate and racially insensitive’ material to her Facebook account.”
- The case was then settled for an undisclosed amount.

Title VII and Section 1981

- Although Title VII does not directly address employee speech, employers must take care to apply their social media policies consistently or risk a Title VII discrimination claim.
- For example, in *Redford v. KTBS, LLC*, an on-air reporter was terminated for a violation of the station's social media policy when he responded negatively to viewer comments on the station's Facebook page.

Case Study: *Redford v. KTBS*

- One of the posts that led to the reporter's termination included the comment, "I get so damn tired of stupid people" (referring to viewers).
- The reporter filed a lawsuit on the basis that the station had applied its social media policy in a discriminatory manner.
- The problem was that the terminated reporter was black, but white reporters had committed similar violations of the social media policy without discipline.

The National Labor Relations Act

- An employee's social media posts that are about working conditions are potentially protected under the National Labor Relations Act (NLRA).
- The NLRA protects certain “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
- In practice, this means that if a social media post relates to working conditions or union activity, there is a good chance it will be protected – even if it is offensive or vulgar.

Case Study: *NLRB v. Pier Sixty, LLC*

- An employee was terminated for making certain profanity-laced comments on his Facebook page. Specifically, the employee said:

“Bob [his supervisor] is such a NASTY MOTHER %\$%&*# don’t know how to talk to people!!!!!!”

“\$&*\$\$ his mother and his entire \$%&*#% family!!!”

“What a LOSER!!!”

“Vote YES for UNION!!!!!!”

Case Study: *NLRB v. Pier Sixty, LLC*

- The NLRB found that the termination was a violation of the NLRA because the subject of the post “included workplace concerns.”
- One important fact is that this post was made days before a union election.
- In addition, the employer consistently tolerated the use of profanity in the workplace.

Common Law Defamation

- In a number of relatively high profile cases, employees who have been terminated due to social media activity have filed lawsuits against their employers for defamation.
- For example, does anyone remember a news story about a viral video of a woman named “Amy Cooper”?

Case Study: *Cooper v. Franklin Templeton*

- Amy Cooper is a white woman who called the police on an African American man, Christian Cooper (no relation) while he was bird-watching in Central Park, in New York City.
- The video of the incident went viral on social media and became an international news story.
- Ms. Cooper's employer, Franklin Templeton, issued a statement on Twitter stating "we do not condone racism of any kind" and "are in the process of investigating the situation"

Case Study: *Cooper v. Franklin Templeton*

- A day after its initial statement, Franklin Templeton issued a second statement announcing that it had concluded an “internal review” and, as a result, Franklin Templeton had terminated Ms. Cooper’s employment.
- In the lawsuit, Ms. Cooper is claiming that in its statements (both the one described above and subsequent similar statements) Franklin Templeton falsely accused Ms. Cooper of being “a racist.”

Takeaways

- If you are a public employer, make sure the termination does not run afoul of the First Amendment.
- Consider applicable state laws before taking action based on an employee's social media activity.
- Focus on the impact to the business – not the activity itself.
- Be careful what you say (or imply) publicly about a termination.

Questions?



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