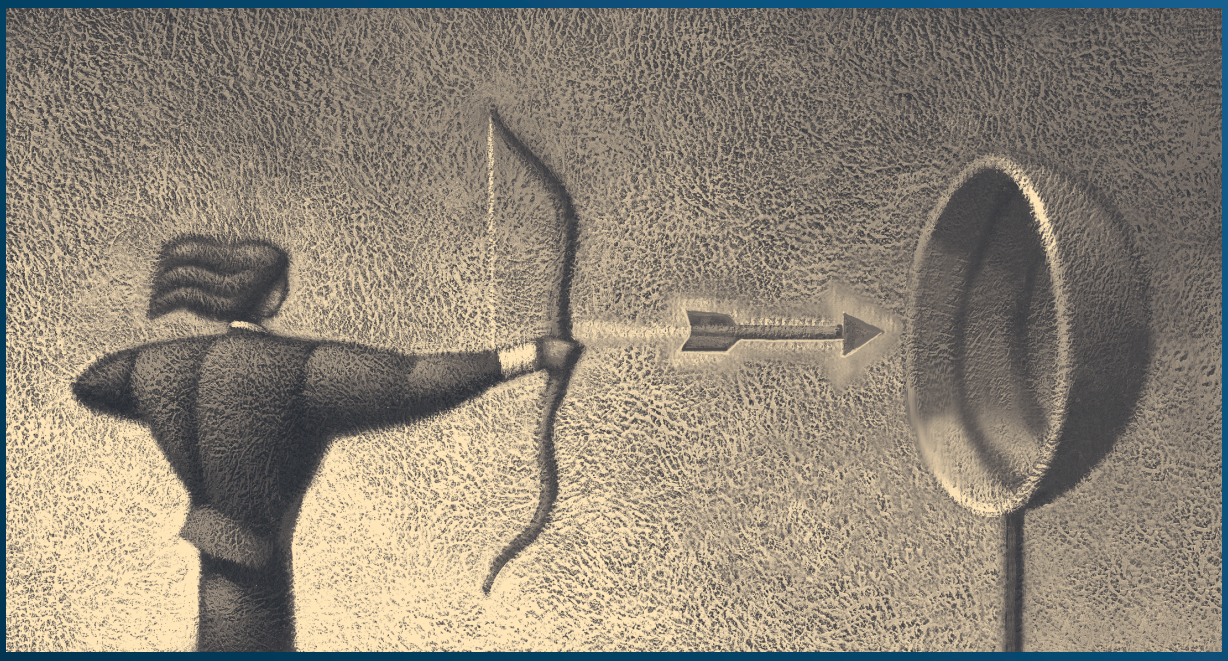
BusinessManagement DAILY

BULLET-PROOF YOUR EMPLOYEE HANDBOOK



Bullet-Proof Your Employee Handbook

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A good employee handbook is essential for effective people management and litigation prevention. Without one, employees don't know where to turn for basic information on your company policies. Managers and supervisors may be tempted to make up rules on the fly, creating a patchwork of confusing rules that may even contradict one another.

You may think operating without a handbook gives your organization flexibility. Nothing could be further from the truth. Instead, the gap invites chaos. Or perhaps your CEO wants to maintain an open-door policy and doesn't want to be tied to written rules. It's your job to persuade them that a well-drafted employee manual actually creates flexibility and paradoxically fosters an open-door atmosphere.

Don't rely solely on an employee handbook template. Using one may expose you to needless litigation. This frequently happens when you rely on a generic fill-in-the-blanks handbook that includes policies that don't apply to your organization or which omit essential policies required in your state or city. For example, most employee handbook templates include an FMLA leave policy. But what if your organization isn't covered by that law because you don't employ 50 or more workers? Are those workers spread geographically over more than 75 miles? Using that template could mean a broken promise lawsuit when an employee relies on your handbook, expecting job-protected leave and you don't deliver. Or perhaps the template includes a complicated disciplinary policy that allows appeals or reviews before final

termination. That raises expectations and the possibility a court will second guess a termination decision because you didn't follow the procedure outlined in the handbook.

Instead, draft your own handbook and take it to your attorney. They can best determine whether the finished handbook meets state, local and federal rules.

Protect your at-will status

Absent a union contract or an individual employment contract, employment in the United States is generally at-will. Both employer and employee are free to terminate the employment relationship for any reason or no reason—thus the term at-will. Of course, employers can't fire a worker for an illegal reason such as race, age, national origin, sex including sexual orientation, disability, genetic status or military status, among other reasons. However, making it clear that there are no employment guarantees is essential and an at-will statement does that. Warning: Montana is a for-cause state and military personnel returning from active duty have limited protection from at-will discharge.

Under USERRA, a reemployed employee may not be discharged without cause: (1) For one year after the date of reemployment if the person's period of military service was for 181 days or more; (2) For 180 days after the date of reemployment if the person's period of military service was for 31 to 180 days. Plus, under the National Labor Relations Act (NLRA), nonmanagement employees cannot be fired for engaging in protected, concerted activity. Also, most states also have a "public policy" exception to at-will employment. For example, most states say it is against public policy to fire a worker who refuses to commit an illegal act on orders of their employer.

While the wording of an "at-will" doctrine sounds harsh, in reality, it's a rare employer that would fire someone for no reason. However, if you guarantee employees that they'll be fired only "for cause," you open yourself to having outsiders examining your motivations and forcing you to come up with a reason when otherwise you would not have to justify management decisions.

Always insert disclaimers

The standard practice for preserving an employer's at-will status is to include a disclaimer in the handbook stating:

- All employees are hired on an "at-will" basis.
- Each person's employment is for no specific term.
- The employer reserves the right to terminate the relationship at any time.
- Nothing in the employee handbook should be construed as a contract or a guarantee of continued employment.

A good at-will statement or disclaimer provides that:

"All employees of [Company Name] are hired on an "at-will" basis. Each person's employment is for no specific term. Either party may terminate the employment relationship at any time, with or without notice or cause. Nothing in this employee handbook should be construed as a contract or a guarantee of continued employment. No manager, supervisor or employee has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company [or owner, board of directors, etc.,] has the authority to make any such agreement and then only in writing."

This statement also protects you from allegations that a hiring manager or a supervisor without authority to do so makes promises that the organization will not keep. All employees understand that their status as at-will employees can only be changed with written approval from the highest levels in the organization. In that case, it's less likely the employer will lose a lawsuit over at-will status. Also, it's less likely a new employee will sue you when you terminate them, claiming they relied on a promise from a hiring manager of a long-term job.

Some states require these disclaimers to be in bold type, capitalized, underlined (or some combination of the three) and be signed by employees. Check the laws in your state to ensure your handbook complies. Even if not required by your state law, it's generally a good idea to have employees sign

a form acknowledging receipt of the handbook and stating they've read and understood it.

Some employers include other items on the acknowledgment, such as an agreement to submit any disputes with the company to binding arbitration, as described in the handbook. (If you're insisting that the handbook is not a contract, this move provides a way to distinguish your arbitration requirement, if you have one. Otherwise, an employee could argue in court that the arbitration requirement, as part of the handbook, isn't binding.)

In other words, you must separate the specific contractual arrangement that is the arbitration agreement from the rest of the handbook so the employee understands that he is acknowledging two different things—that he is an at-will employee and the handbook is not a contract, and that the separate arbitration agreement is a contract to which the employee acknowledges separately as binding on himself and the employer. The arbitration agreement ideally belongs in a separate document, labeled as a contract.

Finally, always consult your attorneys before implementing an arbitration agreement. He or she can best determine whether the language you choose will be valid in each jurisdiction where you have employees. States have different rules on contract formation and what terms an employer can impose on its employees.

Beware the dangers

Employees distraught about losing their jobs or missing out on a big promotion may turn to the handbook for evidence that the company has breached a contract. Courts have sometimes been sympathetic to their claims, especially when the handbook makes what seem to be promises the company has not kept and the employee has relied on those apparent promises.

The handbook might set forth procedures for progressive discipline, which could serve as the basis for a wrongful-discharge suit by an employee who was summarily dismissed for dishonesty.

It might list causes for discharge, giving the impression that it's a complete list—and therefore the company can't fire someone for other reasons. It might include a brief summary of the health benefits, which the employee might rely on instead of reading the summary plan description.

As this case shows, it's a good idea to place a disclaimer in the handbook to the effect that the company doesn't have to follow every procedure outlined in the manual.

An employer that didn't reserve the right to fire employees for serious offenses without going through the progressive discipline process. Even though U.S. Bancorp's employee handbook explicitly said that "policies and procedures do not constitute a contractual obligation" and "employment with the company is an at-will relationship," Susan Messinger sued after it fired her.

Her claim? The handbook stated that the company's progressive counseling "will provide [the employee] with a reasonable opportunity to make the necessary improvements in order to succeed." The 9th Circuit Court of Appeals sided with Messinger, concluding the handbook's promise to provide employees a reasonable opportunity to improve negated the disclaimer language. (*Messinger v. U.S. Bancorp*. No. 04-35548, 9th Cir., 2006)

On the other hand, when the employer made it clear in the handbook that bypassing the progressive discipline policy was the employer's right, the court upheld the company's discharge decision.

A woman who took leave to adopt a foreign child was fired upon her return to work. Why? While she was overseas, her employer discovered that she had failed to send receipts for large donations made to the organization she worked for. Part of her job description was to acknowledge all gifts and donations promptly.

The company handbook provided that employees would be disciplined on a progressive basis. The woman sued, arguing that the handbook was a contract, and therefore her immediate discharge violated the contract.

Her employer argued that the handbook contained a statement that it wasn't a contract and a clause saying the employer "reserves the right to immediately discharge associates without progressing through the first three disciplinary steps."

A federal appeals court concluded that even if the handbook was a contract, the company had reserved the right to fire her. It dismissed the case. (*Smith v. Memorial Foundation of Allen Hospital,* No-01-2821, 8th Cir., 2002)

Bottom line: Always provide an out for discipline decisions. You don't have to list all the reasons that would prompt immediate dismissal, but by making it clear you reserve that option, you retain flexibility whether a court concludes your handbook is a contract or not.

What the courts consider

When weighing evidence in a lawsuit involving employee handbooks, courts consider many factors, including:

Employee's reasonable expectations. While the disclaimer may declare that the employment relationship is strictly at-will and nothing in the handbook should be considered a contract, judges tend to look at the reasonable expectations of the employee involved.

For instance, in *Derrig v. Wal-Mart,* the court noted that the employee understood what the rules were in the handbook and was familiar with the system of progressive discipline described in it. The court decided it was reasonable for the employee to expect that the company would abide by its own rules. However, the court ultimately concluded that the employee had violated Wal-Mart's disciplinary policies and Wal-Mart followed those handbook rules, so that firing him was justified. (*Derrig v. Wal-Mart,* No. 94-11171, DC MA 1996)

Conspicuous disclaimer. When the handbook contains a disclaimer, where is it located? Would a typical employee see it?

In one case, a U.S. District Court in Colorado ruled that the company may have created a contract in its employee handbook because the disclaimer was buried among unrelated paragraphs under the uninformative heading "Introduction." (*Fejes v. Gilpin Ventures,* No. 95-B-1765, DC CO 1997)

Who's covered by each provision. A pharmaceutical company employed a therapeutic specialist who worked from his home. While the therapist was on FMLA leave for surgery, the company replaced him. The therapist sued. In court, the company argued that the therapist was not eligible for FMLA leave because the company did not employ 50 workers within 75 miles of his work site.

An appellate court ruled for the therapist, finding the company was bound by its handbook, which granted FMLA leave to all employees

who worked 1,250 hours in the prior 12 months. The employer could not selectively eliminate the therapist from that provision after the fact. The employee had relied on the provision when he asked for and was granted the time off. (*Peters v. Gilead Sciences, Inc.,* No. 06-4290, 7th Cir., 2008)

Providing for FMLA leave when not required creates expectations that may not technically be contractual, but which a court might enforce if the employee justifiably relied on the promise of leave and can show he or she would have acted differently if the expectation were not there.

For example, if a handbook stated that FMLA leave is available and a worker relied on that promise even though she could have returned to work earlier, a court likely would hold the employer to its promise even absent a contract or other legal obligation.

Oral promises. Even a carefully worded disclaimer can lose its effect if a company executive tells the employees that they will be terminated only for cause, or that their jobs are secure—and then he or she discharges them for some minor infraction. A statement saying that the employee's at-will status may only be changed by a written document signed by the company president (or a similar person) short-circuits this argument.

Note: Never state that at-will status can never be changed; that violates the National Labor Relations Act because it implies that workers can never organize and require their employer to collectively bargain for a contract.

Consideration. When a company replaces its handbook with a version that changes the terms of employment some courts expect the company to have provided some "consideration"—that is, some additional benefit, payment or privilege other than continued employment to compensate employees for the loss. Courts take a dim view of unilateral changes.

Good faith and fair dealing. Although the handbook may say employees are hired on an at-will basis, courts in some states ask whether what happened was fair. Finding an implied covenant of good faith and fair dealing, the court may award damages for outrageously unfair employment decisions.

Employee handbook essentials

Topics typically covered in handbooks include the following:

Welcome to the company:

- Letter from the president
- Brief history of the company

Rules and procedures:

- Working hours
- Lunch periods and breaks
- Holidays, vacations and sick leave
- Family and medical leave
- Disability, pregnancy and religious accommodation commitment and instructions on requesting those accommodations
- Jury duty
- Military leave
- Personal calls/mail/email
- Personal use of company equipment
- Theft and dishonesty
- Misconduct and insubordination
- Use of illegal drugs and alcohol on the job
- Smoking except in designated outdoor areas.
- Dress and grooming code
- Policy on sexual and other harassment and discrimination
- Employee privacy
- Social media policies

Employment policies:

- Probationary periods
- Performance evaluations
- Promotions and transfers
- Seniority
- Terminations and resignations

Compensation:

- Pay procedures
- Payroll deductions
- Performance bonuses
- Overtime payments
- Salary increases
- Expense reimbursement
- Severance pay

Benefits:

- Health, life, disability and other insurance
- Retirement savings plans
- Workers' compensation
- Tuition assistance
- Savings and stock purchase plans

Safety and health:

- General safety rules
- Reporting job-related accidents

A non-discrimination statement:

- Race
- Age
- Sex including sexual orientation and gender identity
- Sexual and other harassment
- National origin
- Religion
- Disability
- Genetic information
- Military service
- Any other protected classification or status under your state or local laws and ordinances

Handbook distribution

Keep these tips in mind:

- Any handbook revision must include complete distribution to all employees with acknowledgment that they received it.
- Make sure the opportunity has been provided to receive the handbook electronically.
- Each worker should be required to acknowledge receiving the revised handbook with a unique username and password that is tracked, including any subsequent access.
- It is advantageous to quiz employees on changes to the handbook.
- Always announce a new handbook and include a process of acknowledgment; also explain that you may change the handbook in the future and that it is not a contract.
- Announce the changes via email and newsletter (if you have one), and through supervisors.
- Make direct supervisors responsible for collecting old versions (if you use a paper handbook) and getting signatures/sign-ins.
- Even with an electronic-only handbook, arrange to have a few paper copies on hand in HR and for distributions to those without computer or internet access
- Determine that all employees in all positions have received the handbook.
- Make provisions for a computer station for regular access for those who don't have computer access at work.
- Schedule an annual review after launch.

Paper v. electronic

An employee handbook confined to paper format can be tedious and expensive to update, but the reasons to consider a switch to an electronic format go far beyond cost and time considerations. A properly implemented electronic version will allow management to track which employee accessed which section of the handbook, and when.

This eliminates "I didn't learn about our tardiness policy until a month ago" and "I didn't know how to report harassment." The proof will lie with the IT staff and the data that proves otherwise. An HR pro can even know which sections of the handbook are being accessed most often, alerting you to the most common employee concerns and areas of confusion. Also, updates can be made on the fly as laws and your organization change, instead of waiting for a new print run. With technology finally allowing you to make your handbook litigation-proof, it may not be long before courts expect you to keep up with the digital way of presenting policies.

Your handbook and the NLRB

If your organization isn't unionized, certain aspects of the employee handbook can either help or jeopardize your chances of staying that way.

First, be careful with the wording of disclaimers. If you state too harshly that your company makes no commitment to continue employment and may fire employees at any time for any reason or no reason at all, union organizers may point to the disclaimer as evidence that workers have no job security and need a union. Soften the language by, for example, explaining the reason for the disclaimer: that just as employees may leave a job for any reason without legal obligations, the company reserves the right to terminate employees for any reason it deems necessary.

Second, make the handbook (and the work environment) friendly enough so employees won't feel the need to have a union. For example:

- Emphasize the company's commitment to good communication with every employee.
- Establish effective channels for resolving problems, and make sure employees feel at ease expressing their concerns.
- Don't be afraid to mention that the company doesn't have a union, and that you're committed to creating a work environment where none is needed.

Even items seemingly unrelated to union organizing can run afoul of the National Labor Relations Act (NLRA). The National Labor Relations Board has found that so-called "civility rules" can sometimes violate the NLRA.

Statements that broadly bar employees from making "negative" comments or require the employee to "represent the company positively" may discourage employees from discussing workplace conditions freely. Remember, the NLRA also applies to non-unionized employers.

If your workers are already represented by a union, make sure the employee handbook acknowledges the existence and authority of the union. In particular:

- If certain groups of workers are required to join the union after a given probationary period, say so in the employee handbook so it won't come as a surprise to new employees.
- Instead of describing benefits, pay practices and other procedures detailed in the collective bargaining agreement (risking inconsistency and confusion), refer covered workers to that agreement.
- Inform union employees that they should speak with their steward about any issues covered in the union agreement.
- State that no information in the handbook shall be construed to alter the union agreement. You should also include a general disclaimer that "Nothing in this handbook is intended to interfere with employee rights under the National Labor Relations Act."

The National Labor Relations Board, which administers the NLRA, has strict rules on what kinds of rules employers can include in their handbooks. The NLRB takes the position that the handbook or other workplace rules imply or specifically state employers will be punished for engaging in so-called concerted, protected activity are presumed to be invalid.

A few examples of protected concerted activities are:

- Two or more employees addressing their employer about improving their pay.
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

Rules that limit these activities violate the NLRA.

The latest NLRB ruling on allowable and unallowable rules in employee handbooks was announced in August 2023 in what's known as the *Stericycle* rule. The NLRB says handbook and other workplace rules require a case-by-case review. No handbook rule is regarded as automatically legal. Instead, for each rule, determining whether it is legal turns on:

- Whether the rule *could* be viewed as limiting a worker's NLRA concerted activity rights, and
- Whether an *economically dependent* employee could view the rule prohibiting concerted activity if they were contemplating engaging in protected concerted activity.

Get your handbook out and begin a thorough review with the new *Stericycle* rules in mind. You're looking for any rules that could be interpreted as discouraging employees from discussing workplace issues among themselves or with outside parties like labor organizations, the new media and federal, state or local agencies in charge of employment discrimination, wage and hour rules or health and safety.

You're also looking for rules that require workers to keep silent on workplace issues, present only the positive side to anyone outside the organization or bar discussing pay, supervisors or company policies and actions with co-workers, investigators, reporters or anyone else not on an approved list. The same goes for not discussing investigations or being barred from participating in a co-worker, applicant or former employee's lawsuit over working conditions.

As you review each rule and the version that may now appear in your employee handbook, evaluate each by addressing two points;

- Does the rule have a reasonable tendency to keep employees from exercising their rights under the NLRA? If so, the rule is presumptively unlawful. It will have to be changed or dropped.
- If you want to keep a version of the rule that's presumptively unlawful, rebut that presumption by proving that the rule advances a legitimate and substantial business interest, and that you are unable to advance that interest with a more narrowly tailored rule. In other words, rewrite the rule as tightly as possible and justify its language by showing your legitimate and important business need.

Here is a recent NLRB decision involving handbook rules to help illustrate why you need to remove problematic rules. The employer had a policy that prohibited discussing pay. That's a very common handbook rule. The employer then gave raises to everyone and told each worker to keep their raise secret, citing the handbook. Two workers compared raises and one went to HR to ask why his was less than his co-worker's. The worker who shared his higher salary was fired and went to the NLRB. The NLRB found the policy violated the NLRA and ordered the worker to be reinstated with back pay and benefits. The employer must also remove the handbook rule.

Civility rules. Employers may bar "[b]ehavior that is rude, condescending or otherwise socially unacceptable" without violating the NLRA. For example, telling workers that they cannot use racist or sexist language that potentially creates a hostile work environment generally is a legitimate behavioral rule because it furthers a legitimate business interest in preventing a hostile work environment and the legal liability that comes with not preventing or stopping such harassment.

There's one caveat, though—the NLRB has taken the view that such language in the heat of the moment during a strike or walkout may be protected concerted activity if it is aimed at management. This conflicts with another agency's interpretation of the laws it enforces. The EEOC says employers should have rules in place that bar this kind of language. In spring, 2024, the EEOC and the NLRB announced that they were working on developing joint guidance on the use of potentially hostile words in the workplace. That guidance has not yet been released at the time of this writing.

NO!

We do not allow negative comments about our fellow team members including co-workers and managers. Employees will not engage in or listen to negativity or gossip and will represent the company in the community in a positive and professional manner in every opportunity.

YES!

We expect all our employees to treat each other and our customers and clients with dignity and respect. That means we do not use words that could

be construed as harassing, degrading or offensive. That means not using demeaning language, telling offensive jokes or stories or using gestures and facial expressions that could be construed as sexually, racially, ethnically, religiously or otherwise offensive. If you have any questions about what is appropriate and what is not, please consult with an HR representative.

Insubordination rules. Employers may have a rule that states "'[b]eing uncooperative with supervisors ... or otherwise engaging in conduct that does not support the Employer's goals and objectives' is prohibited." However, before disciplining someone for being uncooperative, remember that the NLRA allows employee walk-offs or strikes as part of protected concerted activity. Thus, a strike or walkout, whether in a union environment or not, may be protected even if it is also the very definition of being uncooperative and insubordinate.

Disruptive behavior rules. Employers may bar "[c]reating a disturbance on Company premises or creating discord with clients or fellow employees," but be careful to ensure the law still permits lawful activity such as strikes or walkouts just as with civility rules.

Confidentiality rules specifically regarding wages, benefits, or working conditions. These types of rules are highly problematic because they restrict the ability of workers to discuss working conditions among themselves as well as sharing them with regulatory agencies like OSHA or the press when trying to bring attention to those working conditions, wages and benefits (or lack thereof.)

Dress and grooming rules. These can be problematic for several reasons, including violation of several other federal laws like Title VII's prohibitions against religious discrimination, sex discrimination including gender identity and state as well as local laws prohibiting discrimination based on the wearing of hair in its natural texture or style. Plus, under the NLRA, employers can't bar workers from wearing buttons, hats or shirts emblazoned with union logos.

NO!

Employees are expected to dress professionally and consistent with their position with the company. Men must be clean-shaven and have their hair

no longer than the collar. Women must wear their hair in a professional style consistent with their position. No cornrows, braids or other distracting styles allowed. *Employees may not wear any company logos or logos other than the employers*.

BETTER

All employees must dress for their position and must be clean, neat in appearance and free of any distractions that may impair health or safety in the workplace. Employees may not wear or display anything that would be deemed offensive by a reasonable co-worker, customer or client or that violates the right to be free of workplace harassment or discrimination. Employees with questions about what is acceptable may contact the HR office for guidance. Our company remains committed to supporting our employees' religious, ethnic, cultural beliefs and identity and will modify the dress code accordingly. Our company does not enforce the dress code in a way that reinforces stereotypes about how a particular gender should look and dress.

Confidentiality. A policy that requires those who participate in a workplace investigation to keep their participation secret likely violates the NLRA. That's because a workplace investigation into harassment, safety or other workplace problems is by its nature relevant to protected, concerted activity to end harassment, fix safety problems and so on.

NO!

The following types of policies should be removed in their entirety.

- Do not discuss an internal investigation with anyone other than company employees who are investigating this issue. Refer any co-workers or managers who want to discuss the investigation to the HR representative handling the investigation.
- Do not discuss pay or benefits with co-workers. This is confidential information to be shared only with your supervisor and human resource staff.

Other necessary policies

Handbooks should include a number of other policies that haven't been singled out as problematic under the NLRA. Here are a few:

Harassment policy

Every handbook needs a strong anti-harassment policy covering all forms of illegal harassment, not just sexual. That's because harassment based on any form of protected characteristic can become the basis for a lawsuit. In addition, there is only one defense available to harassment and that's having a robust anti-harassment policy designed to prevent harassment in the first place plus an easy-to-use and effective complaint process designed to stop harassment and prevent its recurrence. Note that if the harasser is a direct supervisor and the harassed worker experiences an adverse employment instigated or carried out by that supervisor, there is no effective defense.

Tell all employees they can report harassment to the HR office and that the company will immediately investigate the allegations and take steps to immediately stop harassment. Your anti-harassment policy should also:

- Specify that harassment of any kind will not be tolerated, whether by coworkers or supervisors. Note it is a dischargeable offense.
- Direct those who believe they are experiencing harassment to report the harassment to the HR office or an alternate organization or individual so there are multiple ways to report that guarantee bypassing the alleged harasser.
- Direct that all supervisors are obligated to report any harassment complaints that come their way to the HR office as soon as possible.
- Direct all management-level employees to immediately report observed harassment to the HR office, whether it is happening in their chain of command or another.
- Explain that you have a strict no-retaliation policy in addition to a strict no-harassment policy to protect anyone reporting harassment.

Americans with Disabilities Act

Employers need a handbook policy that explains how disabled workers can request a reasonable accommodation under the Americans with Disabilities Act (ADA). That policy should include the following:

- A statement that the company follows the ADA and welcomes requests for reasonable accommodations from employees and applicants with disabilities who need those accommodations to perform the essential functions of their jobs.
- The policy should inform supervisors that they must forward all requests they receive to the designated person in the HR office who handles ADA reasonable accommodations.
- The policy should note that the request triggers an interactive reasonable accommodations process and that you welcome suggested accommodations.

CROWN ACT policy

CROWN stands for "Creating a Respectful and Open World for Natural Hair." The model legislation is championed by a number of national organizations and aims to end discrimination against natural hair and hairstyles. States have been increasingly adopting the proposed legislation making it one of the fastest adoptions to date at the state level of a new anti-discrimination law. As of this writing, over half the states have adopted a version.

- Consider changing your grooming rules to not bar any styles of hair unless there is a compelling business or health reason for doing so (extremely rare) even if your state has not yet passed the model law.
- Drop language about "professional styles" too—that's often seen as code for Eurocentric styles.

Some major employers have added their own versions voluntarily. For example, one of the nation's biggest transportation employers has changed its grooming and hair rules to reflect cultural changes in hair and grooming.

UPS now allows workers to have facial hair and natural Black hairstyles like Afros and braids. The delivery company, which has more than 525,000 employees worldwide, said it was also eliminating gender-specific rules as part of a broader overhaul of its extensive appearance guidelines, which

cover hair, piercings, tattoos and uniform length. The policy also permits natural hairstyles "such as Afros, braids, curls, coils, locs, twists and knots," and eliminates guidelines specific to men and women. "No matter how you identify—dress appropriately for your workday," the policy states.

While you are modifying your dress and grooming rule to include natural hairstyles, check to make sure you already addressed stereotyped rules in light of the 2020 Supreme Court decision including gender identity in the definition of sex discrimination. The revised dress code above includes the change. Here's why:

In *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, a Detroit funeral home had a gender-specific dress code for its employees. For six years, the employee worked as a male and wore the required suit and tie. The employee then wrote a letter to his employer explaining that he was transitioning to female. Because the dress code required females to wear a dress or skirted suit, he began doing so.

The employer fired the worker. Now known as Aimee Stevens, the worker filed a complaint with the EEOC. The agency, which had recently changed its stand on whether Title VII covered sexual orientation and gender identity discrimination, sued. The 6th Circuit said Title VII covers gender identity. The employer appealed to the Supreme Court.

In a 6–3 decision, the court ruled that the dress code's application to Ms. Stevens violated Title VII. By requiring Ms. Stevens to present as a male when she identified as a female, the employer discriminated against her based on her identity as transgender—which is discrimination based on sex.

Broader anti-discrimination policy

Your anti-discrimination policy also belongs in the handbook to demonstrate your commitment to equal employment opportunity for all. That policy must take into account the inclusion of sexual orientation as a protected characteristic. Here's why:

The Supreme Court decided the following two cases June 15, 2020:

- *Bostock v. Clayton County, Georgia*, involves a child welfare coordinator who claims the county fired him after he joined a gay softball team. He sued and lost, but eventually appealed to the Supreme Court after the 11th Circuit refused to reinstate his case when the trial court tossed it out.

- *Altitude Express v. Zarda*, a female skydiving student told her male instructor she was uncomfortable strapped to him. He explained she had nothing to fear because he was gay. Upon hearing the story, his employer fired him. He complained to the EEOC, alleging the employer violated Title VII of the Civil Rights Act when it fired him. The 2nd Circuit said Title VII covered sexual orientation.

Redefine sex discrimination to include discrimination and harassment based on sexual orientation, gender identity and transgender status. Remove any language that overtly allows now-illegal discrimination. Include a revision of any gender-based dress policies that require stereotypical dress codes like requiring females to wear dresses or skirts and males to wear suits or requiring employees to abide by dress policies based on gender at birth. Update your complaint processes to make sure employees know where, how and when to get help with LGBT discrimination questions and complaints.

Announce the new policies: A crucial step to addressing lingering discrimination based on sexual orientation and gender identity is to announce your organization's new policy. Include a statement about the Supreme Court's ruling and your desire to adhere to both the letter and the spirit of the decision. Remind supervisors and managers that your organization has zero tolerance for *any* form of sex discrimination.

Inspect workplaces: HR should conduct thorough and immediate inspections of all workplaces, including remote ones. Check for any posters, graffiti or other materials that could contribute to a hostile work environment based on sexual orientation or gender identity. Review bathroom assignments based on gender and establish gender-neutral facilities. Give employees their choice of restrooms to use.

Overtime and off-the-clock work

It is also a good idea to have a policy prohibiting unauthorized overtime and off-the-clock work. While you cannot refuse to pay for work hourly employees perform just because the work wasn't authorized, you can punish those who perform the work under your disciplinary policy if you make that clear in the handbook. The policy can be a simple one, stating that employees are

not permitted to perform work that has not been scheduled by their manager or supervisor.

This may be particularly important to drive home for workers you end up reclassifying from exempt positions that are not overtime eligible to hourly positions now that the DOL has published rules calling for a large increase in the minimum salary required for many exempt classifications.

Mother's rooms and the PUMP Act

Back when the Affordable Care Act (ACA) was first signed into law, one of the first provisions to go live was one requiring some employers to allow new mothers unlimited breaks to express milk for their new infants. In late 2022, Congress passed a related piece of legislation, known as the PUMP Act. The new law greatly increased the number of workers eligible for the unlimited breaks and increased the penalties for employers who don't comply.

Your milk expression break policy should look something like this:

Employees with a need to express and store breast milk during their infant's first year of life are entitled to unlimited breaks to do so. These breaks are unpaid for hourly workers except that you may use your regularly scheduled paid breaks if you choose. Should you need additional breaks, hourly workers will be completely relieved of duty during those unpaid additional breaks. Employees should notify their supervisor when they know they will be requiring the breaks. Supervisors will arrange for access to an appropriate private space for the breaks that will include a chair, electricity, a table and means to store the expressed milk.

Pregnant Workers Fairness Act (PWFA)

Another new federal law also passed in late 2022 requires employers to provide reasonable accommodations to pregnant workers, workers who may become pregnant and workers who have recently given birth. Employers need to amend their ADA reasonable accommodations process to include workers covered by the ADA. They also need to amend leave policies to allow time off for pregnancy. Work with HR to develop a comprehensive list of preapproved accommodations and train supervisors on the approval process. Update rules to make clear that employees may ask for leave as a reasonable

accommodation following miscarriage, fertility treatment complications and stillbirth.

Be sure your handbook:

- Explains how to request a pregnancy-related reasonable accommodation, including the possibility that some essential functions may be temporarily dropped altogether.
- Lists reasonable accommodation supervisors are authorized to make without HR approval or documentation. The list should include the right to carry water at one's workstation and take bathroom breaks as needed.
- State that time off in lieu of an accommodation is entirely up to the pregnant worker and that you will work with her to find an accommodation that allows a continued paycheck.
- Clarify that employees may qualify for reasonable accommodations for fertility treatment.

Religion

Another recent change required for handbook rules involves reasonable accommodations for religious needs and practices. As of 2023, the U.S. Supreme Court made it much more difficult to turn down a religious reasonable accommodation request. For four decades before that decision, employers were free to turn down such requests if they created more than a *de minimis* burden. That's no longer the case. Employers must update their handbook rules to take this change into account. Be sure to designate someone in the HR office to handle all requests. Then educate them on religious accommodations. This includes defining religion to include all the common religions focusing on a belief in a monotheistic God, belief systems with multiple gods, no gods and nature-based beliefs. Belief systems focusing on ideas about life, purpose and death can count as religions, while social, political and economic beliefs and personal preferences do not count.

Your religious reasonable accommodations policy should state that you welcome requests for religious accommodations including changes to the dress and grooming policy and schedule changes to accommodate religious practices. It should explain how to request a religious reasonable accommodation including language along the lines of:

"To request a religious reasonable accommodation, contact the HR office. Please be prepared to identify the requirement, policy, or practice that conflicts with your sincerely held religious observance, practice, or belief. Please describe the nature of your sincerely held religious beliefs or religious practice or observance that conflict with the requirement, policy, or practice identified above."

Audit your handbook

If it's been a while since you last overhauled your employee handbook, you may be courting danger. Establish a regular revision schedule to update your handbook once a year or whenever significant statutory or other changes occur. You will want to consult a number of resources to complete your review and make updates as necessary. This list should include reviewing any updated regulations or guidance from the EEOC, the DOL, the NLRB and their state equivalents plus any local ordinances impacting employers. In addition, see what the Supreme Court has ruled in its last term.

You don't want your employees relying on outdated or even illegal policies. Plus, you may obtain lower rates on your employment practices liability insurance, which protects businesses from various kinds of employee lawsuits.

Handbooks must change with the times; those that gather dust on the shelf may be more dangerous than no handbook at all. That's especially true if anything in your manual reinforces corporate cultural norms at odds with current discrimination laws. Outdated handbooks can provide ammunition even for otherwise futile lawsuits, and language from a bygone era may come back to haunt you.

Case in point: A female bank employee quit after 25 years because a male co-worker earned more than she did. She filed an Equal Pay Act (EPA) lawsuit and won. But that wasn't all. Because the EPA allows employees to win double damages and an additional year's back pay if they can prove the violation was "willful," the former employee claimed the company handbook proved intent to discriminate.

She pointed to a policy that addressed scheduling problems for "ladies with children going to school" and another one that said employees couldn't

use sick leave for maternity leave. These policies, she said, reinforced a corporate attitude that men are more valuable employees than their female counterparts. *Simpson v. Merchant and Planters Bank,* No. 04-3972 (8th Cir.)

When you prepare the current revision, plan for later versions by stating in both the conspicuous disclaimer and the receipt/acknowledgment that you reserve the right to make changes to any of the handbook's provisions.

Caution: What you exclude from your handbook can be as important as what you include. Employment lawyers recommend that you omit the following:

- Instructions to managers.
- An arbitration clause.
- Details on benefits.
- Policies on leaves of absence.
- Details that change frequently.
- Any policy that won't seem enforceable.
- Any promise you don't intend to keep.

Keep the language in your handbook simple and the format readable. "Use plain English," advises attorney Brooks Kubik. "If you don't, people won't read it."

Have your lawyers review a draft of the handbook to make sure it's a document that can help you avoid legal troubles, not invite them. Many federal employment laws, including the FMLA and ADA, require employers to distribute notices and policies in languages other than English when a "significant portion of workers are not literate in English." (29 CFR §825.300) While this provision does not specifically apply to employee handbooks, it stands to reason that enforcing agencies (Department of Labor, EEOC, etc.) expect employers to inform workers of their rights in a language they understand.

Recommendation: When issuing a revised handbook, make sure employees and supervisors discard their old handbooks and sign a receipt for the new one.

Handbook checklist

Here's a handy checklist to use when updating your handbook. Check off each after you verify that your handbook includes the item and that you have checked that it is up-to-date.

- ☐ At-will statement
- ☐ Non-contract acknowledgment
- ☐ Acknowledgment of handbook receipt
- ☐ Updated milk expression policy
- ☐ Updated reasonable accommodations policy for pregnancy
- ☐ Updated all handbook policies after NLRB overturned Boeing case
- ☐ Policy encouraging mental health and employee assistance program
- ☐ Updated telework rules for dress, grooming, behavior, harassment and décor
- ☐ Policy outlining complaint process for harassment and discrimination
- ☐ Rule requiring bystander discrimination and harassment reporting
- ☐ Policy for disability and religious reasonable accommodation
- ☐ Policy allowing leave as a reasonable accommodation even if no leave earned or left
- ☐ Policy on dress and grooming that includes state and local rules on natural hair plus religious beliefs
- ☐ Policy on dress and grooming that allows transgender expression and does away with stereotype-based dress codes
- ☐ Remove rules on pay discussion
- ☐ Revise civility rule to ban hate speech but allow "gossip" and "negativity"
- ☐ Policy on overtime and volunteer time

- ☐ Consider a separate supplemental handbook for some locations or occasions
- ☐ Updated DEI policy/programs to with recent litigation after Supreme Court affirmative action decision

The 12 most common mistakes

Employment lawyers point to the following mistakes that employers make in handbooks, which could spell trouble for your organization:

1. Using form handbooks, which usually have many provisions that have nothing to do with your organization.
2. Meshing policies and procedures, which confuses employees and provides more fodder for plaintiffs' lawyers.
3. Including a probationary period, implying that anyone who stays with the company 90 days is then a permanent employee.
4. Being too specific in descriptions and lists, especially those involving discipline.
5. Not being consistent with other company documents.
6. Not adding a disclaimer, or not enough in the right places.
7. Sabotaging disclaimers by what you do or say, especially reassuring employees that their jobs are secure and they'll be fired only for a really good reason.
8. Not adapting the handbook for each state's laws.
9. Failing to update the manual frequently for changing laws.
10. Being unrealistic about what your employees or supervisors will buy into as your policy.
11. Incorporating overly broad rules.
12. Making 'over the top' anti-union statements.

Personnel practices audit: Your company handbook

Use the following questions to analyze the thoroughness and reliability of your employee handbook:

If you answer "No" to any of these questions, you should review your company policies and the way they are communicated to your workforce.

1. Does your handbook clearly state that it is not to be considered a contract in any way and that you reserve the right to change it?
2. If your handbook lists offenses warranting discipline, including discharge, does it make clear that those listed are merely illustrative rather than exhaustive?
3. Does your handbook encourage employees to bring their complaints to their union or to management?
4. Does your handbook make clear that any type of harassment is not tolerated?
5. Does it provide procedures for addressing complaints of that nature?
6. Do the benefits policies contained in the handbook comply with federal and state laws?
7. Do all employees receive copies of the handbook each time it is revised?
8. Do you have a receipt form that employees sign when they receive the handbook or any revisions of it?
9. Is your handbook up to date in all areas?
10. Does your attorney review your handbook regularly to see that it contains nothing in conflict with federal and state laws or local regulations?
11. Is it written clearly and simply?
12. Is the language respectful of employees?

13. Are the rules described in the handbook enforced in an evenhanded manner?
14. Do you make sure that your employees read the handbook?
15. Is it free of political statements, including the company's opinions regarding labor organizing?

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