WHY YOUR LAW FIRM SHOULD HAVE AN EMPLOYEE HANDBOOK
Handbooks can be an important part of a law firm’s effort to carefully train supervisors with respect to personnel matters & their obligations under the applicable laws governing the employment relationship.
Reasons to Have an Employee Handbook

- Ensure legal compliance
- Avoid litigation
- Potential legal benefits
- Improved employee relations
Defining the Audience

The first step in preparation of an employee handbook or manual is to determine the audience to whom the policies will be addressed.
Defining the Audience

• This determination will depend on the size of the workforce, the organization and geographical distribution of operations, the job classifications of employees, and other factors.

• The selection of the audience for the handbook or manual will impact the topics to be covered by the material.
  – What topics would be appropriate for management vs. non-management employees?
No hard-and-fast rules but, generally, a basic employee handbook will contain:

– An **Introductory section** describing:
  – Purpose
  – Audience
  – Sources of additional information
  – At-will statement
  – Replacement policies
Recommended Handbook Topics

• An equal employment opportunity policy setting forth the law firm’s commitment to equal employment opportunity

• Anti-discrimination, anti-harassment and anti-retaliation policies
  – Definitions
  – Complaint procedure
    • What makes a complaint procedure effective?
Recommended Handbook Topics

- A wage and hour provisions section:
  - Classifications
  - Work schedules, workweek, and workday
  - Frequency of pay
  - Breaks and meal periods
  - Overtime
  - Time recording requirements, the workweek, and the workday established for overtime pay calculation purposes, time-recording requirements, and overtime work requirements.
• A **reasonable accommodation policy** outlining the Firm’s commitment to engaging in the interactive process and listing appropriate contacts.

• An **FMLA/DCFMLA policy** setting forth procedures and expectations for taking leave.

• An **electronic communications policy** outlining confidentiality, discrimination, harassment, cybersecurity, lack of privacy, e-mail use and union activities
Recommended Handbook Topics

- A benefits section setting forth vacation, holidays, sick leave, leaves of absence, insurance coverage, pension plans, and other benefits available to employees.
  
  • Refer to the Plan and the Summary Plan Description (SPD)

- Work safety and/or conduct rules informing employees about the Firm’s expectations as to behavior in the workplace.
• An acknowledgment and receipt form for employees to sign and return, recording their receipt, understanding of, and agreement to abide by the provisions in the manual or handbook.
Recommended Handbook Topics

- Reporting procedures and forms to be used in connection with matters such as employee vacation requests, requests for leaves of absence, and reporting and dealing with on-the-job injuries or illnesses may also be included in supervisor manuals.
Recommended Handbook Topics

- Carefully drafted suggestions or guidelines for evaluating, counseling, and disciplining employees with performance problems. With appropriate qualifications and explanations, it is possible to set forth useful management techniques for improving employee performance without compromising the at-will status of employees.
When enforcing dress codes or grooming policies, Firms must be sure that the standards are not applied in an unlawfully discriminatory manner.
What policies should DC Firms consider including in their handbooks?

- DC Sick & Safe Leave
- DCFMLA
- Pregnancy Accommodation
- Lactation Accommodation
- Wage Disclosure Protection
- School Activities Leave
- Jury Duty Leave
- Emancipation Day Leave
- Cell Phone/Texting While Driving
- Smoke-Free Workplace
You may want to consider adding the following policies:

- Mission statement
- Open-door policy
- Other time off
- Conduct rules
- Performance
- Retirement plans
- Employee investigations
PITFALLS OF HANDBOOKS
• Employees are claiming that employee handbooks are actually contracts of employment & thus binding on employers.

• As a result, employers often express concern that rather than simply stating the guidelines of employment, an employee handbook will bind them to the substance of its provisions.
Disclaimers

- Courts have held that a clear & forthright disclaimer in an employee handbook is a complete defense to an employee’s breach of contract action based on the employee handbook.

- Include a written disclaimer in the employee handbook that specifically states that the handbook does not constitute a contract of employment.
Have the employee sign a statement indicating receipt of a copy of the employee handbook and acknowledgment that it is not intended as an employment agreement or to alter the at-will employment status, & that the handbook may be changed or revised at any time.

This is particularly important if a revised handbook is being issued.
Ineffectual Disclaimers

• Disclaimer most likely to succeed if handbook contains nothing that could reasonably be interpreted as promising any limitation on the at-will presumption.

• Outcome is less predictable, however, if an employer couples disclaimer with handbook language promising some sort of security.

• In this situation, disclaimer creates inherent ambiguity, which may be decided against the drafter of the handbook.
National Labor Relations Act

- Protects employee rights to engage in “protected, concerted activity”
- This includes talking with each other regarding wages, hours, and working conditions
- The NLRB protects the rights of employees, whether or not they have formed a union.
The NLRB’s March memo outlined an attack on common employer policies:

- Confidentiality
- Employee Conduct
- Interaction with Third Parties
- Company logos, copyrights, and trademarks
- Photography and recording
- Leaving work
- Conflicts of interest
- Handbook disclosures
- Social media
- Distribution/solicitation
Confidentiality Rules

• The General Counsel notes that employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees as well as with nonemployees, such as union representatives.

• Rules that prohibit discussions, or a confidentiality rule that broadly encompasses employee or personnel information, will be found unlawful.
Confidentiality Rules

UNLAWFUL
If something is not public information, you must not share it.

LAWFUL
No unauthorized disclosure of client information, business secrets, or other confidential information.
The General Counsel notes that employees have a Section 7 right to criticize or protest their employer’s labor policies or treatment of employees.
Professionalism/Anti-Harassment

**UNLAWFUL**
Be respectful to the Firm, other employees, clients, consultants, and competitors.

**LAWFUL**
No rudeness or unprofessional behavior toward a client, or anyone in contact with the Firm.
Other Examples of **Unlawful** Professionalism Rules per NLRB GC

- “Be respectful of others and the Company”
- “Disrespectful behavior towards management is prohibited”
- “Do not engage in defamatory, libelous, slanderous or discriminatory comments against the Company, its customers and/or competitors”
- “Chronic resistance to proper work-related orders or discipline, even though not overt insubordination, is prohibited”
- “Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.”
Logo and Trademark Rules

• The General Counsel recognizes that copyright holders have a clear interest in protecting their intellectual property, but handbook rules cannot prohibit employees’ fair protected use of that property.
UNLAWFUL
Do not use Firm logos, trademarks, graphics, or advertising materials in social media.

LAWFUL
Respect the laws regarding copyrights, trademarks, rights of publicity and other third party rights. Provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on Firm logos, brand names, taglines, slogans, or other trademarks.
Photography Rules

• The General Counsel stated that employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take pictures and recordings.
Photography Rules

UNLAWFUL
Taking unauthorized pictures or video on Firm premises is prohibited.

LAWFUL
Employees may not take, distribute or post pictures, videos, or audio recordings while on working time, or take pictures or make recordings of work areas. Exception: activity protected by the NLRA including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.
The General Counsel stated that employees have a Section 7 right to communicate with the news media, government agencies and other third parties about wages, benefits and other terms and conditions of employment. The most frequent offenders in this category are media policies.
UNLAWFUL
Employees are not authorized to speak to any print and/or electronic media person about Firm matters.

LAWFUL
We strive to anticipate and manage crisis situations in order to reduce disruption to our employees and maintain our reputation as a high quality law firm. To best serve these objectives, the Firm will respond to the news media in a timely and professional manner only through the designated spokesperson.
Restrictions on Leaving Work

- The General Counsel asserts that one of the most fundamental Section 7 rights is the right of employees to go on strike. Rules that regulate when an employee can leave work are unlawful if employees would reasonably read them to forbid protected strikes and walk outs.
Restrictions on Leaving Work

**UNLAWFUL**
Failure to report to your scheduled shift for more than three consecutive days without prior authorization or *walking off the job* during a scheduled shift is prohibited.

**LAWFUL**
Entering or leaving the Firm without permission may result in discharge.
The General Counsel noted that Section 7 of the Act protects employees’ right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer’s interests.
UNLAWFUL
Employees may not engage in any action that is not in the best interest of the Firm.

LAWFUL
Employees must refrain from any activity or financial interest that is inconsistent with the Firm's best interest. Refrain from activities, investments or associations that compete with the Firm, interfere with one's judgment concerning the Firm's best interests, or exploit one's position with the Firm for personal gain.
NLRB Complicates Internal Investigations

“While I’m investigating these concerns about misconduct I need you to keep this discussion completely confidential.”
Internal Workplace Investigations

• A blanket policy that requires employee confidentiality during an HR investigation violates the NLRA and employees’ rights to engage in concerted activity
• Whether confidentiality is required must be determined on a case-by-case basis

Banner Health System, N.L.R.B. No. 93 (2012)
Concerted Activity?

Fired for FB, Tweets? NLRB Rulings Draw Lines
The NLRA prohibits discipline against employees who engage in “protected concerted activity”
- **Protected** = related to the terms or conditions of employment, unionization, or an on-going labor dispute
- **Concerted** = “with, or on the authority of, other employees and not solely by and on behalf of the employee himself.”

Employees in a non-unionized workplace can engage in protected, concerted activity
Pier Sixty LLC (Mar. 31, 2015)

• “Bob is such a NASTY M****R F****R don’t know how to talk to people!!!!!! “F**k his mother and entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!”

NLRB SAYS

• “We also agree with the judge that Perez’ comments were not so egregious to exceed the Act’s protection.” (emphasis added)
Three D, LLC, d/b/a Triple Play Sports Bar & Grille v. NLRB, October 21, 2015 (2nd Circuit)

- A former employee initiated the discussion by posting the following status update to her Facebook page:
  – “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money … Wtf!!!!”
- Several current Triple Play employees and a customer posted sympathetic comments. Then, a coworker selected the "Like" option under the initial status update.
- In response to a subsequent comment by the initial poster accusing one of Triple Play's owners of criminal conduct, a second employee added: "I owe too. Such an asshole."
- After learning about the Facebook discussion from another employee, Triple Play terminated both employees.
- NLRB found and Second Circuit agreed, both terminations were unlawful.
Did the Employee Cross the Line?

• What is the subject matter of the post?
  – Does it relate to collective activity or individual gripe?

• Nature of the employee’s post
  – Any verbal or physical threats?

• Who is participating in the discussion?

• Was the post disruptive to the workplace?

• Was the post provoked by the employer’s labor practice?
Review employee handbooks, work rules, job applications, & other forms of employee communications to delete or limit statements regarding fair treatment, progressive discipline, good cause for termination, and permanent employment.
Most Common Handbook Errors

- “Use it or Lose it” Vacation Policies
- Harassment Policies Discussing Only One of the Protected Categories (e.g. Sexual Harassment)
- Overbroad FMLA and Other Paid Leave Policies
- Legally Inconsistent Exempt Employee Policies
- Including Frequently Changed Provisions
Most Common Handbook Errors

- Confidentiality Policies
  - Failure to include
  - Over-inclusive policies
Most Common Handbook Errors

• Insufficient At-will Language
• “Contract” Language
• Introductory Language
• Failure to Follow Handbook Provisions
Implementing New or Revised Handbook Policies

• Prepublication Review
• Distribute Policies prior to Effective Date
• Provide Notice to Employees of Revisions to Existing Policies
• Schedule Meetings with Managers to Review New and Revised Policies
• Distribution of New/Revised Handbooks and Acknowledgment
Practical Tips

- Establish policies with *specific rules* that are easily understood.
- Know what you are trying to restrict and draft language accordingly.
- *Avoid subjective terms and standards* that require employees to attempt to discern what the Firm is prohibiting.
• Consider whether policy will be understood by employees to *prohibit discussion* of wages, performance evaluations, workplace safety, discipline, or other protected terms and conditions of employment.

• *Use examples and limiting language* where possible rather than issuing a blanket, vague statement.

• When a policy addresses matters where more detail is provided elsewhere in the handbook, *make a specific reference to the more detailed policy*.

• Consider a disclaimer or “savings clause.”
Drafting Tips

• Include clear, unambiguous language
• Ensure compliance with legal requirements
• Avoid statements or promises that are inconsistent with the employment-at-will relationship
Key Take-Aways

- Discussing issues relating to work is protected, concerted activity
- Watch out if you are taking actions based on employees’ speech about the workplace, their working conditions, or their supervisors
- Just because you don’t have a union, doesn’t mean your employees don’t have NLRA protection
- Co-worker's “like” was sufficiently meaningful to rise to the level of “concerted activity” under the NLRA
Questions?
Handbook Review and Revisions: Best Practices

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