Ring In The New Year With An Updated Employee Handbook

By **Kasey Cappellano, Meaghan Gandy and Laurel Stoncius** (December 16, 2024)

At the beginning of every year, the world is buzzing with New Year's resolutions. One of the best resolutions an employer can make is to update its employee handbook, as an up-to-date handbook is a powerful way to mitigate, and sometimes prevent, costly litigation.

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Outdated handbooks, however, may run the risk of not complying with various rules and laws. Handbooks can even be marked as "Exhibit A" and used as evidence against employers in court proceedings!

For example, in Chapman v. Oakland Living Center Inc. in 2022,[1] the U.S. Court of Appeals for the Fourth Circuit reversed a lower court's ruling granting summary judgment to the employer-defendant. In analyzing the employee's hostile work environment claim, the court noted the employer hadn't included an anti-harassment policy and complaint procedure in its employee handbook or circulated a copy of the handbook to all employees.

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This failure, the court held, could lead a reasonable jury to find that the employer should have known the alleged harassment could be occurring, given the apparent lack of prohibition against such conduct. This case shows that problematic handbooks can pose serious difficulties for employers defending against employment claims.

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Conversely, sound handbook policies can bolster an employer's defenses.

In 2023, the U.S. Court of Appeals for the Seventh Circuit affirmed a district court's ruling dismissing a hostile work environment claim under Title VII[2] in Trahanas v. Northwestern University.[3] In analyzing whether the employer had successfully raised the Faragher-Ellerth defense,[4] the court looked primarily to the handbook's anti-harassment policy.

Based on the handbook's policies, the court held that the employer exercised reasonable care to prevent harassment. Furthermore, it determined the employee unreasonably failed to take advantage of the corrective opportunities or otherwise avoid harm by not following the handbook's complaint procedures.

Likewise, in Cooper Jr. v. CLP Corp. in 2017,[5] the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a disability bias suit brought under the Americans with Disabilities Act. In so holding, the court relied in part on the employer's anti-harassment policy in its handbook, which the court said "strictly prohibited discrimination or harassment based on disability and retaliation against an employee that reported harassment."

Well-drafted handbook policies that prohibit harassment and set forth a protocol for

addressing such issues can be valuable evidence for employers in defending discrimination actions.

Employers should also update their handbooks to comply with new legal precedent.

For instance, over the past few years, several states have adopted unique paid and unpaid leave laws. These laws may affect the total hours of leave an employee is permitted to take per year, and may also expand the definition of family members whom the employee may care for under the law and the qualifying reasons an employee may take leave.

An employer's existing paid or unpaid leave policies should be updated to give notice of any additional state entitlements, explain the interaction of company benefits with those provided by law and comply with any new requirements. Complying with state and local mandates requires detailed review of an employer's existing leave policies and procedures.

More specifically, Nebraska, Alaska and Missouri recently enacted paid sick leave laws. Until now, these states did not require private employers to provide their employees with any form of paid sick leave. As such, these brand new laws may require employers that have employees in any of the three states to either create entirely new sick leave policies or significantly revise their existing policies.

It is crucial that employers stay apprised of the state law applicable to both on-site and teleworking employees, and implement appropriate leave policies and procedures.

Further, employers must ensure their policies and procedures comply with the Pregnant Workers Fairness Act, or PWFA. This new law requires employers to provide reasonable accommodations to workers for conditions "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."

Importantly, even if the employee cannot currently perform the essential functions of their job, they must receive accommodations under the PWFA so long as the limitation is only for a temporary period and the employee will be able to perform the essential function "in the near future."

Although the PWFA shares some similarities with the ADA, it also departs from it in several key areas, which can create compliance traps for the unwary. Employers must clearly understand the new obligations imposed by the PWFA and should ensure their handbook policies are compliant.

Additionally, in the wake of COVID-19 and the surge of remote working arrangements, employers face a unique set of challenges.

For example, wage and hour claims, and associated retaliation claims, are common in employment litigation. Remote working arrangements can make it very difficult for employers to supervise and document the hours worked by nonexempt employees. As such, handbook policies should include time reporting and approval procedures to avoid confusion and expensive litigation.

Another pressing issue that many employers need to address in their handbooks is medical marijuana laws. Increasingly, states are legalizing cannabis use for medicinal or recreational purposes with varying restrictions and guidelines.

Again, these state laws differ in scope and duties imposed on employers. As such,

employers should consider reviewing their workplace drug and alcohol policies, as well as their drug testing policies, for compliance with new state laws on medical or recreational marijuana use.

Employee dress codes have also been scrutinized by the National Labor Relations Board in recent years.

Indeed, the NLRB's decision in Tesla Inc. in 2022 overturned agency precedent regarding uniform policies and dress codes. In that decision, the NLRB held that it is presumptively unlawful for an employer's policy or rule to interfere with an employee's right to display union insignia in any way.

Employers may overcome this presumption by demonstrating "special circumstances," such as risks to employee safety, products or equipment. That said, employers should closely scrutinize their dress code policies to ensure compliance with the NLRB's current stance on employee dress codes. Without revision, employers may be subject to unfair labor practice charges.

These are just a few examples that demonstrate the importance of regularly reviewing and revising your employee handbook. In addition to running afoul of recently developed law, which can result in expensive litigation and create legal exposure for your organization, an outdated handbook can cause confusion among your employees.

Other noteworthy reasons to have a regularly updated handbook include:

- Preventing misunderstandings by introducing employees to the company's background, culture and expectations;
- Demonstrating the employer's knowledge of and compliance with applicable local, state and federal laws;
- Generating employee goodwill by showing the employer's commitment to treating everyone fairly and equitably;
- Providing a reference guide to supervisors and managers and ensuring that policies are applied consistently;
- Mitigating certain claims, such as breach of employment agreement or invasion of privacy;
- Supporting affirmative defenses and shielding against certain claims, including harassment or improper wage deductions;
- Creating additional safeguards via safety-related policies and procedures;
- Reducing the risk of information theft and unfair competition; and
- Educating decision-makers on rapidly changing areas of the law, such as NLRB decisions, guidance from the U.S. Equal Employment Opportunity Commission and the U.S. Department of Labor, artificial intelligence in the workplace, state legalization of cannabis, paid sick leave laws and many more.

Given the frequent changes in employment laws, employers should consider scheduling a periodic review of their handbooks and policies, and the start of a new year is an opportune time to do so.

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[1] Chapman v. Oakland Living Ctr., Inc., 48 Fed. 4th 222, 232 (4th Cir. 2022).

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., prohibits employers from discriminating against employees because of race, color, religion, sex, or national origin.

[3] Trahanas v. Northwestern Univ., 64 Fed. 4th 842, 854-55 (7th Cir. 2023).

[4] Employers may avoid vicarious liability for supervisors' harassment by raising the Faragher-Ellerth affirmative defense. To be entitled to this defense, the employer must show: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. See Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[5] Cooper v. CLP Corp., 679 F. App'x 851 (11th Cir. 2017).