

DRAFTING AND REVISING EMPLOYMENT HANDBOOKS—EMPLOYER BEWARE!

KURT H. DECKER

Stevens & Lee, Pennsylvania

ABSTRACT

Handbooks and employment policies are used by employers to communicate with their employees. Courts have in certain circumstances considered handbooks as binding commitments imposing new liabilities and responsibilities upon employers that alter the traditional at-will employment relationship; i.e., that either the employee or the employer can discontinue employment at any time, for any or no reason, with or without notice. This article discusses the extent to which handbooks should be prepared and used by employers. It examines their advantages, disadvantages, and possible contents.

Handbooks and employment policies gained importance in the workplace as employers became larger and their organizations more complex. A system of governance through rules, guidelines, and procedures was necessary for orderly and efficient employer functioning. Handbooks and employment policies answered this need. They created the order needed for larger organizations by standardizing employer instructions without depending on the decision-making inconsistency of individuals.

Today, handbooks are often the only place where the employer sets forth its employee guidelines. They are commonly intended to create a closer relationship between an employer and employees.

Employers may be tempted to avoid preparation of an employment handbook because, as some may mistakenly believe, "My employees know what my policies are." In an age of emerging individual employment rights litigation, this is a dangerous attitude. A well-written, comprehensive handbook's importance should not be underestimated [1]. It can help avoid confusion, abuse, and misinterpretation of the employer's procedures and policies [2].

A handbook can be used as a reference guide in a single source. The handbook gives the employer the opportunity to inform employees about its background and place in the community, thus helping to create a commitment to the employer and its goals.

No two handbooks are exactly alike. The handbook should reflect each employer's management and operational style. Most handbooks:

1. Document employer procedures, policies, and work rules to serve as a behavioral guide for employees by clarifying the employer's position on these matters;
2. Serve as an information source for new and current employees about the employer, its organizational structure, and overall philosophy; and
3. Provide employees with their own up-to-date, easy-to-understand reference guide on the range and comprehensiveness of the employer's compensation and benefits program.

A handbook's contents may be affected by whether separate booklets covering individual subjects involving pension rights, health care benefits, and so forth are made available by the employer. Should these separate documents be used, they must be consistent and coordinated with similar handbook provisions to avoid misunderstandings or unwanted liability.

No set list of topics must be covered in a handbook. Some employers prefer to devote their handbook to uncomplicated matters covering their background, time-off policies, and disciplinary rules; other employers cover more complex issues involving pensions, profit sharing, medical benefits, etc.

A good handbook should be comprehensive and precise. No matter how much care is taken in compiling the clauses that comprise the handbook, a handbook that is overly technical, formal, or simply unclear will not achieve its communication purpose and can also create unnecessary legal problems.

Handbook clauses must be drafted with care and caution because of their potential legal implications. Clauses must reflect the current law in the particular jurisdiction in which the employer is located. For example, statutes regarding compensation, vacations, and voting time off may vary [3]. Handbook clauses must be carefully reviewed for compliance with these statutes. Likewise, some states have found that employment handbooks may create binding commitments [4], while other states have not [5]. The current law of the specific state must be consulted before the handbook's final issuance, and there must be periodic subsequent reviews to determine any changes.

Handbooks can also be used by employers to assist in remaining nonunion [6]. A nonunion employer's handbook contents are usually similar to the subject matter contained in a collective bargaining agreement [7]. Because of this, the employer's response to a union organization campaign can be that the handbook already provides what a collective bargaining agreement sets forth absent the necessity for employees to pay union dues for these benefits [8].

USES

The basic uses for handbooks in the employment relationship are to:

1. present information;
2. establish good employment relations;
3. set forth the value and type of benefits available;
4. save time and expense by answering the most often asked questions;
5. establish and build morale; and
6. meet certain federal and state legal requirements.

ADVANTAGES

Handbooks can be a beneficial method of establishing successful employment relations. Advantages of using handbooks are that they serve as a means to:

1. promote positive employee relations;
2. communicate benefits, policies, and employees performance standards;
3. reduce the frequency of basic questions to supervisors and managers;
4. promote consistency and fairness in the application, administration, and enforcement of policies;
5. diminish the likelihood of arbitrary, capricious, and discriminatory employment practices;
6. encourage periodic updating, review, evaluation, and formalization of policies to remain consistent with the employer's requirements and legal obligations; and
7. serve as a union-prevention measure, in that many handbook provisions are similar to clauses found in collective bargaining agreements.

DISADVANTAGES

Certain problems may be presented by handbooks. Disadvantages handbooks offer include:

1. courts in the majority of states consider employers bound in various ways by their handbook commitments;
2. they may reduce the employer's flexibility to quickly alter or change policies; and
3. imprecise handbook language or omission of subject matter may create interpretation and administration problems similar to those encountered under collective bargaining agreements.

HANDBOOK TERMS

In preparing handbooks, employers can exercise considerable discretion in communicating their policies to employees. Policies, practices, compensation, and benefits vary significantly among employers regarding their subject matter. Set forth below is a checklist of the subject matter commonly addressed by school district handbooks:

1. Introductory statement
2. At-will employment disclaimer; i.e., the employment relationship can be discontinued at any time by either the employee or the employer for any or no reason, with or without notice
3. Equal employment opportunity statement
4. Employee classifications
 - New hires
 - Full-time employees
 - Part-time employees
 - Temporary employees
5. Compensation
 - Exempt employees
 - Nonexempt employees
 - Overtime
 - Compensatory time off
 - Timekeeping requirements
 - Work schedules
 - Meal and rest periods
 - Payday
 - Reporting/time pay
 - Holding pay
 - Pay differentials
 - Training programs
 - Meals, lodging, and tips
 - Uniforms, tools, and equipment
 - Payroll deductions
 - Advances
 - Deposits
 - Gratuities
 - Wage and salary reviews
 - Severance pay
 - Pay in lieu of notice
6. Benefits
 - Sick pay
 - Vacation
 - Holdings

- Insurance
 - Pension/retirement plans
 - Profit-sharing plans
 - Educational benefits
 - Benefits required by law
7. Leaves of Absence
 - Medical leave
 - Pregnancy leave
 - Bereavement leave
 - Personal leave
 - Military leave
 - Jury duty or witness leave
 - Unpaid leave of absence
 8. Discipline procedures
 - Discipline
 - Progressive discipline
 - Work rules
 9. Performance evaluations
 10. Personal files
 11. Medical files
 12. Layoffs
 13. References
 14. Dispute resolution procedures
 15. Miscellaneous policies
 - Alcohol and drug abuse
 - Dress codes
 - Resignations
 - Acquired Immune Deficiency Syndrome (AIDS)
 - Smoking
 16. Acknowledgment and receipt

DRAFTING GUIDELINES

In drafting the employer's handbook, the following should be considered:

1. What subject matter should be included
 - a. Determine what to write
 - b. Create an outline
2. Format
 - a. Bound
 - b. Loose-leaf
3. Style and cost
 - a. Printed

- b. Mimeographed
- c. Typed
- 4. Size
- 5. Ease of explaining or understanding subject matter to be included
- 6. Frequency of need for information change
- 7. Employees to whom it will apply
- 8. Positive or negative impact
- 9. Legal issues
 - a. Contractual commitments
 - b. Liability potential
- 10. Approval requirements

DRAFTING CAUTIONS

To limit potential employer liability arising out of handbooks, the employer should heed the following precautions:

1. Do not use “for cause” or similar statements in discussing discipline or termination [9] if the employer intends to remain an at-will employer; i.e., that either the employee or the employer can discontinue the employment relationship at any time, for any reason or no reason, with or without notice;
2. Eliminate durational or employment term references;
3. Be consistent;
4. Avoid terms denoting “permanent” employment [10];
5. Express compensation in terms of actual pay periods and not as “annual” entitlements;
6. Determine the person responsible for handbook changes;
7. Use phrases such as “initial review”; “orientation,” or “introductory” period instead of a “probationary period” to avoid interpretations of “permanent employment”; and
8. Avoid an all-inclusive list of punishable offenses subject to discipline or termination by reserving the right to discipline or terminate for offenses not listed [11].

REVISING EXISTING HANDBOOKS

Once created, the employer’s handbook must be regularly reviewed and revised to assure that it does not create unwanted binding commitments and remains consistent. In reviewing existing handbooks, the following should be considered to maintain the at-will employment relationship:

1. Probationary period
 - Does an employee become “permanent” or “regular,” possibly altering the at-will employment relationship?

- Are there different standards for termination, depending on probationary or regular employment status, possibly altering the at-will employment relationship?
 - If the employment relationship is at-will, why does probationary status need to be considered?
 - The use of this term in collective bargaining agreements often means a regular employee cannot be terminated except for proven cause after completion of the probationary period.
2. Consider deleting any assurances of “fairness” or “job security.”
 3. Add brief, general at-will employment disclaimers to those policies and segments of the handbook not intended as binding commitments.
 4. Review any written policies relating to employee discipline and termination to:
 - be sure the procedures are clearly described as guidelines and clearly provide that appropriate discipline depends on the particular facts and circumstances and on the employer’s discretion;
 - be sure descriptions of specific progressive discipline procedures cannot be interpreted to apply to all employees in all circumstances as a matter of right.
 5. include a statement that the employer reserves the right to change its policies at any time at its sole discretion with or without advance notice. Change may include:
 - revoking;
 - discontinuing;
 - reducing or substituting alternative benefits that may or may not be equivalent or comparable, etc.
 6. consider specifying rules that are not all-inclusive with penalties so that a judge or jury cannot substitute their later judgment about reasonableness.
 7. be sure to include the at-will employment reservation language.
 8. determine whether additional consideration must be given to current employees for these handbook revisions to be binding [12].

CONCLUSIONS

By following these procedures, employers can effectively use handbooks to communicate with employees. At the same time they can retain an at-will employment relationship, limit their liability, remove unwanted commitments, and lessen the possibility of losing their nonunion status.

* * *

Kurt H. Decker is a partner with the law firm of Stevens & Lee in Reading, Valley Forge, Allentown, and Harrisburg, Pennsylvania. He serves as an adjunct professor with the School of Law, Widener University, and with the Graduate School of

Industrial Relations of Saint Francis College in Loretto, Pennsylvania. Mr. Decker is the author of numerous books and articles on employment law, published by John Wiley & Sons. He is also the author of the *Individual Employment Rights Primer* (1991), published by Baywood Publishing Company, Inc.

ENDNOTES

1. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).
2. See K. Decker and H. T. Felix, *Drafting and Revising Employment Handbooks* (John Wiley & Sons 1991); K. Decker, *Drafting and Revising Employment Policies and Handbooks* (John Wiley & Sons 1994).
3. See, e.g., Cal. Elec. Code § 14350 (West 1977) (voting time).
4. See, e.g., *Wooley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (binding commitment).
5. *Williams v. Delta Haven, Inc.*, 416 So.2d 637 (La. App. 1982) (nonbinding commitment).
6. See *Wooley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985) (handbook offered to employees to refrain from organizing for collective bargaining purposes); *Reilly v. Stroehmann Bros. Co.*, 367 Pa. Super. 411, 532 A.2d 1212 (1987) (handbook grievance arbitration procedure in exchange for nonunion status (dissent)).
7. See, e.g., also *Kerr v. Rose*, 216 Cal. App.3d 1551, 265 Cal. Rptr. 597 (1990) (employer's policy providing for right of recall to certain positions supports laid-off employee's claim for breach of covenant of good faith and fair dealing where an employee was induced based on the policy to accept lay-off status rather than a demotion).
8. See *Reilly v. Stroehmann Bros. Co.*, 367 Pa. Super. 411, 423-424, 532 A.2d 1212, 1281 (1987) ("The neutral arbitration provision, moreover, is not a mere gratuity. Stroehmann expressly limited availability of the procedure to 'non-union' employees. Thus, in exchange for the neutral third-party arbitration of discharge disputes Stroehmann expected its employees to continue their employment without the benefits of union representation or membership. A reasonable employee would understand the terms of the bargain: Stroehmann promised to forgo one of its rights as a means of inducing its employees to forgo one of theirs") (dissent).
9. See, e.g., *In re Certified Question*, 432 Mich. 438, 443 N.W.2d 112 (1989) (employer's written policy of terminating only for cause may be modified upon reasonable notice to employees); see also *Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1565 (D. Hawaii 1988) (no just cause promise found).
10. See *Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 763 (Minn. Ct. App. 1987) (terms "permanent employment," "life employment," and "as long as the employee chooses" indicate only an at-will employment relationship absent additional express or implied stipulation evidencing employment duration).
11. See, e.g., *Tolbert v. St. Francis Center*, 189 Ill. App.3d 503, 136 Ill. Dec. 860, 545 N.E.2d 384 (1989) (handbook that provides termination for violations of standards of professional conduct, policies, rules, and regulations does not create just cause termination commitment because it does not specify procedures to be followed for

discipline or termination, which are a necessary part for a just-cause requirement to arise); *Harrell v. Montgomery Ward*, 189 Ill. App.3d 516, 136 Ill. Dec. 849, 545 N.E.2d 373 (1989) (same).

12. See, e.g., *Thompson v. Kings Entertainment Co.*, 653 F. Supp. 871 (E.D. Va. 1987) (an employer who has bargained away the right to terminate employees without just cause through a handbook cannot unilaterally convert an employee's status to an at-will employment relationship by mere issuance of a second handbook; the employer must comply with contract modification requirements before doing so to ensure that the employee has assented to and received additional consideration for the status change).

Direct reprint requests to:

Kurt H. Decker, Esquire
Stevens & Lee
111 North 6th Street
Reading, PA 19601