Don't Download One From the Net

Five mistakes you don't want to make in drafting an employee handbook

By Jeffrey P. Englander, Keith A. Markel and Evan S. Lupion

Reprinted with permission from *Corporate Counsel*
August 1, 2014

Employers often adopt certain employment policies to include in their employee handbooks that have been taken verbatim from other sources. In some instances, employers adopt an entire employee handbook based on a sample found on the Internet. Much like different business operations and models, however, employee handbooks are not intended to be one-size-fits-all.

Many employment laws do not apply to businesses of a certain size or location, so all policies must be tailored to a particular target business. Employment policies must also be regularly updated to adapt to changes in your business and to ensure compliance with the changing law in your jurisdiction.

While some policy statements in a standard handbook are required by law, many others are not, but are included as a means of clarifying the terms and conditions of the employer-employee relationship, or to entice attractive candidates with certain employee benefits. If not properly drafted, however, these policies can backfire on employers and expose them to greater liability than if they had included nothing at all—particularly when an employer's own policies are not followed or enforced on a consistent and evenhanded basis.

Here are five common mistakes that employers should avoid.

1. Failing to Update

Many employers make the critical mistake of failing to ensure that their employee handbook policies are current and compliant with all relevant federal, state and local laws. Employers can harbor a false sense of security if they rely on a comprehensive employee handbook—even one prepared by sophisticated employment counsel—which has not been updated to ensure that it is compliant with current laws.

For example, certain jurisdictions, including New York City, have recently implemented paid sick leave requirements for private employers, but other jurisdictions (such as the entire state outside New York City) have not. New York state mandates that each employer obtain a written acknowledgement annually from each employee confirming employees' awareness of their hourly and overtime rates of pay, whereas many other states have no such requirement.

Although employee handbook policies may remain legally compliant with certain aspects of the law, employers should audit their handbooks on at least an annual basis to ensure full compliance and to safeguard against liability growing out of changes in legal requirements that have not been implemented.

2. Failing to Enforce

Employers include certain policies in their handbooks to promote workplace efficiency and to act as a deterrent to unwelcome behavior. For example, an employer may include language that

explains its performance assessment process or provides for progressive discipline in the event of employee misconduct. On its face, this type of policy generally poses little risk to an employer. If such policies are not consistently enforced, however, the employer is open to potential claims of disparate treatment.

Suppose a terminated employee complains that she was not provided with a required performance assessment or was not provided with the type of progressive discipline referenced in the handbook prior to suspension or discharge. These scenarios are common and can be used as evidence to support claims of unlawful termination or discrimination. Employers must remember that even where policies are not legally required, failure to consistently apply them can pose liability risks for an employer. This is why employers should only include those policies that make sense for their particular business.

3. Drafting Unnecessary or Ambiguous Policies

Poorly drafted employee handbooks can result in the unintended grant to employees of certain contractual rights not contemplated and not otherwise existing. For example, employers—especially those that adopt the one-size- fits-all approach discussed above—may include policy statements that are inapplicable to their business, such as family and medical leave rights to workforces not otherwise entitled to them.

Employee handbook policies also may create unnecessary ambiguities. For example, many employers refer to a specified "probationary" period at the commencement of employment when they have already characterized the employment relationship as "at-will," meaning that either side can terminate the employment relationship at any time with or without cause or notice. A probationary period creates unnecessary ambiguity, as it is generally used in the context of a collective bargaining unit or in circumstances where the employer wishes to provide a waiting period for new hires' coverage under certain benefit plans (such as group health insurance coverage). The better course would simply be to refer to a new hire's waiting period for benefit participation or coverage, and address it in (and only in) the applicable benefits sections.

In short, unnecessary or ambiguous policies can create problems for an employer. These can easily be avoided through careful and thoughtful drafting of employment policies to match your business.

4. Creating Unclear Complaint Procedures

To avoid a potential discrimination or harassment complaint, employers should have well-drafted, clear and comprehensive antidiscrimination and antiharassment policies. Having such policies in place can be a central defense against claims, and can provide a clear road map for reporting and investigating allegations of behavior contrary to those policy statements.

Clarity and simplicity are essential for drafting and implementing these policies, and for investigating such claims. Employers should make it clear that complaints may be made orally or in writing and that each complaint, whether formal or informal, will be promptly and thoroughly investigated. Antidiscrimination and antiharassment policies should be distributed to all employees at the time of hiring, and should be acknowledged by them in writing. Many employers choose to republish such policies annually. In addition, employers should continuously review and update their employment policies to ensure that they cover all characteristics protected by federal, state and local laws.

5. Violating the NLRA

According to recent decisions of the National Labor Relations Board (NLRB), certain policy language contained in an employee handbook that relates to an employee's status, or to confidentiality or social media requirements, could violate the National Labor Relations Act (NLRA). Section 7 of the NLRA provides all employees with the right to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining." Many employers, however, mistakenly conclude that the NLRA does not apply to their worksites because their employees are not unionized. The NLRB has gone on record that it will examine employee handbook policies of nonunion, private-sector employers to ensure that such policies do not hinder or violate an employee's ability to engage in "concerted activities" under Section 7 of the NLRA. For example, the NLRB has stated that certain "at-will employment" disclaimers that suggest that employees must forfeit or restrict their rights to engage in concerted activities violate Section 7, will not be enforced and may result in the prosecution of unfair labor practices. Similarly, the NLRB views blanket confidentiality and social media restrictions as unlawful to the extent that these policies "chill" employees' rights to discuss the terms and conditions of their employment.

Employers must be very specific in what they deem confidential, or what they restrict in terms of employees discussing employment circumstances through social media, and should indicate in their confidentiality and social media policies a legitimate reason why keeping such information confidential or protected from the public outweighs employees' rights to discuss the terms and conditions of their employment outside the workplace.

In sum, the use of an employee handbook should not be treated lightly by employers. Mistakes in drafting and enforcing them could have significant impact on a business. While employers may find the need to update their employment policies challenging at times, and enforcing those policies in a uniform manner equally burdensome, the simple reality is that a comprehensive, well-drafted handbook can be an invaluable asset that should not be overlooked.

Jeffrey P. Englander and Keith A. Markel are partners, and Evan S. Lupion is an associate, in the New York office of Morrison Cohen. All three are members of the firm's labor and employment litigation group, which Englander chairs.