

YEAR END HANDBOOK CHECKUP

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Handbooks grow old faster than television sit coms. If yours is scheduled for revision, review the legal issues listed below to be sure your handbook is up to date.

At-will Employment

Maryland recognizes the rule that employment is “at-will” unless there is a contract for a specific time period. Maryland’s highest court says, “In Maryland, at-will employment is an employment contract of indefinite duration. It can be legally terminated at the pleasure of either party at any time.” The right to terminate employment at any time is important, and employers try hard to protect it.

Terminated employees frequently point to some language in an employee handbook and say, “The handbook shows my employment is not at-will”. For example, if the handbook contains a list of offences, employees say they can only be discharged for a listed offence. Maryland courts have not been friendly to such suits, but it is best to avoid them all together.

Handbooks should contain a specific at will clause. It should say something like, “Notwithstanding any other statement in this handbook, all employment at [company name] is employment at will. Employees may resign for any reason or no reason and [company name] can terminate employment at any time and for any reason or no reason. Only the company president can make a contract of employment for a specific period, and any such contract must be in writing and signed by the company president.” In addition, sections on discipline should be written with at-will employment in mind.

Employee Discipline

One key to a stable workforce is fair and uniform treatment. Employees should know what is expected of them, and what will get them in trouble. At the same time, it is important to protect employment at will. To achieve these contradictory goals, you must find a middle ground.

Many discipline sections start like this; “Every organization has rules to insure that people work together and organization goals are met. [company name] is no exception. The following are some principles we expect our employees to follow. This list is not intended to affect an employee’s right to quit for any reason or no reason or [company name’s] right to terminate an employee for any reason or no reason.”

Some employers have adopted employee grievance procedures or fair hearing procedures before a panel of employees and supervisors. Fair hearings can increase employee job satisfaction and prevent discriminatory discharges, but they come with risks. Statements made during fair hearings can sometimes be used to prove discrimination. For example, a supervisor on a panel might say, “John did not follow his supervisor’s direction because he is old and set in his ways.” Also, employees frequently sue saying they can not be discharged without a “fair hearing”. Maryland’s highest court

has said, "If an employee is not afforded the job termination procedures outlined in the handbook, the employee may have a breach of contract action against the employer." Employers who want to adopt hearings should weigh the risk and plan the procedure carefully.

Employee Privacy

Employers generally want to prevent misuse of company email and telephones. Retail stores often want to search purses or bags of departing employees. Sometimes employers need to search desks or lockers. Can they do those things?

Maryland permits suits for "invasion of privacy", but the person suing must show a reasonable expectation of privacy. Under federal law, listening in on telephone conversations is illegal unless the person knows he is being monitored. In a recent case, a supervisor intercepted email showing an affair between two employees. When the supervisor sent the intercepted email to the wife of one employee, the company lost a big damage award.

Handbooks should be part of an employer's plan to manage employee expectations of privacy. If phone calls will be monitored, employees should be told. Many companies imbed a notice in Outlook or other email programs stating, "Email sent from this work station is company property. It will be regularly stored and checked. If there is something you do not want us to see, do not send it by email from here." If bags or desks will be inspected, the handbook should say so. Employees can not have a "reasonable expectation" of privacy if they are on notice that the company may search bags, listen to phone calls, or read email.

Employee Benefits

Under ERISA, a federal law, employers who have benefit plans must give each employee a "summary plan description" (SPD). The SPD must describe in plain language the requirements for eligibility, participation, and benefits. It must name the plan administrator and contain other required information. If an employee sues for benefits, the court will decide the case based on the SPD.

Be sure that any benefit description in a handbook can not be confused with an SPD. Each benefit description should say, "See the summary plan description to determine your rights under this plan." Even more important, any benefit description should insure the employer's right to terminate or modify the plan. Any discussion of benefits should contain the following: "[company name] intends to continue benefit plans indefinitely, but reserves the right to amend or terminate them with or without notice at any time."

Vacation

Vacation plans are often simple. Sometimes they say, "You will get two weeks vacation after a year." Government agencies and courts read the "two week" policy to mean, "If you are fired for stealing after 10 months, your will get 10/12 of two weeks vacation." If that is not what the company wants, it must change its policy statement.

Here is a vacation policy which tells how much pay and how it is earned. “You will earn one day of vacation for each month in which you work at least 100 hours. The maximum vacation you can earn in one year is 10 days. You will not be entitled to any vacation pay unless you report to work and work your first scheduled day after January 1 of the year after the year in which the vacation was earned. Employees terminated for misconduct will not be paid vacation.”

EEO and Harassment Policy

Standard EEO policies are available everywhere. Every company should have one. Harassment policies have evolved based on court decisions and must be reviewed regularly. One recent change is the increase in the number of race and religion harassment suits. The EEOC’s sexual harassment language is no longer adequate for harassment policies. The following are the key points which should be in every policy.

- The policy should forbid harassment on the basis of race, religion, color, creed, sex, national origin, and handicapped status. Depending on what state you are in, you may have to add legal out of work activity, sexual orientation, and genetic makeup.
- The policy should **require** employees to report anything they believe is harassment. [Don’t put harassment definitions in the policy. Just say, “If you believe you are being harassed, report it.] Remember that the Supreme Court said a policy is not a defense against supervisory harassment unless it is unreasonable not to follow the policy and report the conduct.
- The policy must promise **no retaliation**. Nothing in the policy is more important than this promise. If a senior VP harasses a clerk, and then has the clerk fired for reporting the harassment, juries will award maximum damages.
- The policy must identify who will take harassment reports. Supervisors should never be designated to take reports.
- The policy must promise a reasonably confidential investigation and a remedy if warranted. The policy should not promise that witnesses or alleged harassers will not be told the name of the charging party. If you are going to conduct a fair investigation, you can not keep this promise.