WHEN WAS THE LAST TIME YOU UPDATED YOUR EMPLOYEE HANDBOOK? THE TIME IS NOW

By Daniel N. Janich

Every time you hire, fire or discipline an employee you rely on your employee handbook to keep you out of legal trouble. What happens then if your trusted handbook is outdated? The law is ever changing. New court decisions, state and federal legislation, government regulations affecting employer/employee relations abound. As such, your employee handbook must reflect the changing legal environment to ensure that you stay in compliance and you can continue to safely rely upon it so you don't run afoul of the law. Specifically, the recent legal developments described here point to the need for language precision and clarity so you can avoid expensive unintended consequences as well as ensure that your handbook provisions are not perceived as discouraging or negatively impacting employee activities protected by law. Also, if there is new legislation that protects employees, your handbook must be updated with policy provisions that incorporate the new legislation.

Below I will detail several instances of new legal developments ranging from a court decision to administrative agency pronouncements and new state legislation that reflect how imperative it is for you to update your employee handbook now, to avoid significant potential liabilities and adverse consequences later.

1. Your handbook policies must include a complete statement of the conditions and requirements as to when they apply so as not to mislead employees.

Courts continue to closely scrutinize employee handbook provisions in cases where employer actions are challenged as unlawful. Such actions may relate to benefits, working conditions, or discipline, including employee termination. In a recent Sixth Circuit case decided January 26, 2015, *Tilley v. Kalamazoo County Road Commission*, the Court of Appeals found the employer was not permitted to deny FMLA eligibility to its employees **even though under the applicable legislation no such eligibility existed,** simply because a misrepresentation in the employee handbook occurred.

In *Tilley*, FMLA benefits were not available to the employees because the employer did not have the requisite 50 or more employees within 75 miles of the employee's work site. However, the handbook never addressed this requirement, stating instead: "Employees covered under the [FMLA] are full-time employees who have worked for the Road Commission and accumulated 1,250 hours in the previous 12 months." In other words, despite the fact that the employer was not subject to the FMLA the court, based upon the wording of this provision, denied the employer a right to deny FMLA coverage. In failing to accurately detail in its employee handbook FMLA's eligibility requirements in a manner that was consistent with the statute, the court held the employer liable for FMLA coverage.

Recommendation: Avoid unintended consequences. You must ensure that your handbook language accurately and precisely describes when and to whom certain policies apply.

2. Regardless of whether you have a union or non-union workforce, your handbook policies must be drafted to remain in compliance with the National Labor Relations Act (NLRA), as interpreted by the National Labor Relations Board (NLRB).

a) Your handbook policies cannot be perceived to discourage concerted labor activities. On March 18, 2015, the National Labor Relations Board (NLRB) Office of the General Counsel (OGC) issued its "Report of the General Counsel Concerning Employment Rules" GC 15-04, warning employers that Section 7 of the National Labor Relations Act (NLRA) requires employee handbook policy provisions to be drafted in a manner that clearly avoids discouraging or prohibiting "protected concerted activity." A violation of this section can result in penalties to union and nonunion employers alike.

The Report covers several instances where restrictive or otherwise poorly drafted policy provisions that are commonly found in most if not all employee handbooks may violate Section 7. These violations are based upon the view that certain employee policies, for example, such as those covering confidentiality, employee conduct, third party communications, use of trademarks or copyrights, on site photography and recordings, media contact and law enforcement, loitering, and social media policies, may actually hinder employees' ability to engage in concerted activities to improve wages and working conditions.

Recommendation: Many of these policies need to be redrafted to include language derived from NLRB decisions to ensure they could not be interpreted to be in violation of any NLRA provision.

b) Overly restrictive social media policies in your handbook may be problematic. Section 7 is not the only provision to worry about. The NLRB continues to issue rulings that find employer discipline to be in violation of various other provisions of the NLRA. For a recent example one need look no further than *Pier Sixty, LLC*, 362 N.L.R.B. No. 59, 3/31/15, where a catering company was found in violation of NLRA Section 8(a)'s free exercise protections by firing a server for posting a profanity laced Facebook message. The message was considered by the NLRA as both a protest of alleged supervisory abuse and a bid for employees to vote for a union in an upcoming election. It is quite likely that similar cases may involve handbook provisions governing the use of social media. If such policies are drafted in a manner that is deemed to impinge upon the free exercise protections of employees, an NLRA violation may result with attendant adverse consequences for the violating employer, whether it is union or non-union.

Recommendation: You must review and timely amend your handbook policies to ensure that your policies do not violate federal labor law. For union and nonunion employers alike, an employee handbook policy that violates the NLRA may result in the recall of any disciplinary measures previously imposed, including an employee firing, and may require that any failed union election be retried.

3. If you are a public company, your handbook policy provisions cannot be perceived to discourage Securities and Exchange Commission (SEC) whistleblower activity.

The Securities and Exchange Commission (SEC) has joined the handbook fray by filing an administrative enforcement action against an employer for a confidentiality provision that had overly restrictive language considered by the SEC to potentially discourage whistleblowing. Under the Dodd-Frank Act whistleblowers that report possible securities laws violations are provided financial incentives, cannot be subjected to employment-related retaliation, and are provided various confidentiality guarantees. The SEC went further to protect whistle blowing employees in Rule 21F-17, by prohibiting any action that may impede someone from communicating with the SEC staff about a possible securities violation, "including enforcing, or

threatening to enforce, a confidentiality agreement . . . with respect to such communications."

Confidentiality statements that prohibit employees from disclosing sensitive information to outside parties are common. In addition to separately written and signed statements, many employee handbooks contain boilerplate language in a confidentiality provision that restricts the employee from disclosing any company related information to outsiders without prior company permission.

The SEC proceeding, *In the Matter of KBR, Inc*., SEC Administrative File No. 3-16466, issued April 1, 2015, involved a company that required employee witnesses in an internal investigation to sign confidentiality statements that subjected them to discipline if they discussed the matter with outsiders without prior permission. Such outsiders would include, of course, the SEC, which cited the company for a violation of Rule 21F-17. The company agreed to: 1) settle upon payment of a $130,000 penalty, 2) cease and desist from committing future Rule 21F-17 violations and, perhaps most importantly, 3) amend its confidentiality provisions to clarify that this policy does not and will not apply to SEC whistleblower protections.

Recommendation: Public companies must ensure that their confidentiality provisions--wherever they appear such as in employee handbooks -- include language clearly specifying that employees are free to report possible violations of the securities laws to the SEC and to any other federal agency without company approval or fear of retaliation. A failure to amend in this fashion may expose the company to SEC penalties under Dodd-Frank.

4. Your employee handbook must reflect newly enacted state legislative developments that affect employee rights.

For example, if you are an Illinois employer, your handbook must address the Illinois Pregnancy Accommodation Act (775 ILCS 5/1-102) effective January 1, 2015. The law essentially requires Illinois employers to accommodate pregnant workers and those who recently gave birth if doing so will not pose an undue hardship on the employer. It also prohibits employment discrimination against pregnant applicants, retaliation against pregnant workers for making an accommodation request, forcing pregnant workers to take a leave if reasonable accommodations can be provided, and failing to reinstate an employee to an original or equivalent position,

seniority and benefits upon signaling her intent to return or when a reasonable accommodation is no longer needed absent proof of an undue hardship on the employer. This legislation requires Illinois employers to reexamine and revise their leave and accommodation policies.

Recommendation: Public and private employers must recognize the impact that state laws have on their employee handbook provisions, particularly when those laws involve newly created employee rights. The handbook must be amended to address these rights in new policy provisions.

What Should Employers Be Doing With Their Employee Handbooks to Minimize Risk of Potential Liability?

First, Review and Update Your Employee Handbook Annually To Identify Problem Areas. Employer Ignorance or Inattention to Language Precision Will No Longer Be Excusable.

With the legal developments described above, particularly at the federal agency level, the stakes are much higher for employers. Employers are now clearly on notice that the NLRB or SEC will closely scrutinize their employee policies, provisions and agreements for any language that has the potential to discourage protected activity or conduct. In fact these agencies are acting consistently with the EEOC's recent challenges to severance agreements that include confidentiality provisions having the effect of discouraging former employees from cooperating with an EEOC investigation of discriminatory conduct. The courts remain active in this area as well, often relying upon the wording of an employee handbook provision to support their ruling in favor of the employee.

Second, Ensure that Your Employee Handbook Contains Up To Date Properly Drafted Employee Policy Provisions.

Your handbook should be written in clear, simple language that is easily understood. It must also be fully in compliance with current federal, state and local law provisions.

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