EMPLOYMENT
& LABOR LAW

ADVICE
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LITIGATION

Alfred J. Landegger
Larry C. Baron
Michael S. Lavenant

Roxana E. Verano
Laura S. Withrow
Christopher L. Moriarty
Oscar E. Rivas
Elijah Richardson
Marie D. Davis
Brian E. Ewing

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A LAW CORPORATION

STAYING WITHIN THE LINES

Making Your Employee Handbook Work for You

Employment Law Workshop

By

Alfred J. Landegger, Esq.
Michael S. Lavenant, Esq.

Main Office
15760 Ventura Blvd.
Suite 1200
Encino, CA 91436
(818) 986-7561
Fax (818) 986-5147

Ventura Office
751 Daily Drive
Suite 325
Camarillo, CA 93010
(805) 987-7128
Fax (805) 987-7148

www.landeggeresq.com

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I. Is An Employee Handbook Necessary?

A. Yes - Creating an employee handbook that includes a set of formal work rules and policies, and includes such topics as anti-harassment and disciplinary action, is essential in today's litigious environment. Employee handbooks are a way of ensuring that all employees are aware of your rules. You want to make sure your employees are aware of the rules before they break them.

B. No - If you have only a handful of employees, creating an employee handbook may be overkill. In addition, small businesses may balk at the expense of creating an employee handbook with all of the bells and whistles. However, it is still important that all employers have a set of basic written policies – as simple as a couple of pages of clearly stated work rules – which are either distributed to employees or posted on an employee bulletin board. Giving your employees your policies, rules and expectations in writing allows you to document that the employee was informed about the rules, if you later have to enforce them.

C. Employees need to know their company's policies. These policies should not be guarded as company secrets which are sprung on employees once they violate them.

D. An employee handbook can be the simplest, most comprehensive way of communicating essential information about benefits, policies and performance standards to all of your employees at all levels. In addition, an employee handbook is the perfect vehicle for implementing policies that help minimize your company's exposure to employee lawsuit.

II. Basic Concepts for all Handbooks and Written Policies

A. Make Sure It Is Clear, Readable and Understandable – A handbook must be written in a way that is understandable to your entire workforce, not just your most sophisticated employees or upper management. A few purposes of a handbook are to promote fairness and articulate rules and standards that are intended to guide both your workers and your managers. If your policies are poorly drafted, unclear, or susceptible to multiple interpretations, then these objectives may be impeded which may lead to more problems.

B. If you draft the handbook yourself, resist the temptation to write a document that only you can understand. All meaningful terms, such as "at-will," "exempt," "non-exempt," should be defined. Avoid using the term "permanent employee."

C. If you provide different benefits to your full-time employees than you do for your part-time and temporary employees, then clearly spell out what benefits may or may not apply to each group.

D. If a large portion of your workforce is fluent in other languages, consider having the handbook and work rules also available in the other language.

E. Be Flexible - Avoid the temptation of trying to have your employee handbook cover each conceivable situation. By doing so, you will run the risk of having policies enforced inconsistently by your managers. Give your employees a guideline, but allow for flexibility.

F. Make sure that your employee handbook is consistent with other employer documents. For example, if your company has a Policies and Procedures Manual designed to guide department heads and managerial employees, make sure that the policies in that manual are consistent with the policies in the employee handbook.

G. Your employees should know about the work rules that govern their employment. Do not have one or only a few copies of the handbook that are only available to management, or kept in the human resources department for employees to review at their convenience. All employees should be given a copy of the handbook. Current employees should be given the handbook when it is first implemented and when it undergoes any complete revisions. New employees should be given the document when they are first hired.

H. Invite your employees, both in the handbook and orally, to ask their managers or members of the human resources department about any questions they may have in the handbook regardless of whether those questions arise when they first receive the handbook or months later when they are faced with an issue.

I. Consider Whether You May Need Multiple Handbooks

J. Avoid Using Canned Software or Borrowing Someone Else's Handbook - While computer software programs or another company's handbook may be a good starting point to preparing your company's own work rules, they also likely contain policies that are not applicable to your company.

For example, the handbook could contain a section dealing with progressive discipline of employees that has a comprehensive scheme requiring oral and written warnings before an employee is terminated. If you have such a policy in your handbook and you do not enforce it, you may be found liable for wrongful termination merely because you did not follow this disciplinary procedure, or a court may hold that employees can only be terminated for cause regardless of whether you have an at-will policy in the handbook.

In addition, the computer software may give you a handbook that complies with federal law, or the law of another state, but does not deal with the intricacies of California law.

III. What Type of Policies Can Help Avoid Lawsuits or Limit Liability?

A. At-Will Employment Presumption in California (Labor Code §2922) – It is still the law in California, despite the fact that it has been chipped away over the years. At-will is not a defense to claims of harassment and discrimination, but can be useful to knock out claims for "wrongful termination" based on a "bad cause" for termination or for breach of the covenant of good faith and fair dealing. At-will, if documented properly in the handbook and other locations, can be a complete defense to such claims.

1. Remember not to include progressive discipline language that will negate the protections afforded by at-will.

2. At-will language can also be placed in sections on performance reviews and wage increases. "A positive performance review or wage increase does not change the employee's at-will employment relationship"

3. Recent case law has made it clear that the normal activities relating to employment, such as wage increases, performance reviews, demotions and long-term employment, do not change the at-will relationship. Nevertheless, based on several cases in California, it is certainly a good idea to have as much at-will language placed throughout the handbook and related documents (e.g., employment application).

4. It is also critical that there be a phrase in the handbook and in the acknowledgment providing as follows: "This at-will relationship may not be modified except in a writing signed by the President of the Company." This will negate any claim by the employee that the at-will relationship was modified orally. You also need to indoctrinate your supervisors and mid-level managers (usually the weakest link in the management chain) that they should not make promises that would negate the at-will relationship.

5. Factors That Assist In Overcoming the At-Will Presumption

a. Progressive Discipline: Employers often make the mistake of having good at-will language at the front of the handbook and 25 pages later having detailed progressive discipline policies. This will negate at-will and prevent you from getting out of a litigation at the summary judgment stage on contractual causes of action.

i. The discipline language should be very broad and give the employer complete flexibility:

Example: "Disciplinary action may include oral warning, written warning, probation, suspension or termination. The choice of any particular disciplinary action is within the complete discretion of the Company and will not change the employee's at-will employment relationship with the Company."

ii. You may want to include a laundry list of infractions, but make clear that the list is not exhaustive. Also, it is not a good idea to break out "immediate termination" offenses from lesser offenses. They should all be in the same list, and violation of those policies "may subject an employee to disciplinary action up to and including termination."

b. Introductory Period: Make sure that these are headed "Introductory" rather than "Probationary." A true probationary period would involve an employee who is being disciplined for some reason and is on "probation." The use of the term "probation" in the context of a new hire arose from the public sector, where such terminology is still used.

i. Make clear in this section that the period may be extended within the discretion of the company and that "successful completion of the introductory period does not alter the employee's at-will employment status with the Company."

ii. If you provide for a review at the end of the introductory period, make sure that you conduct a review. Failure to do so will perhaps be a negative later.

B. Equal Employment Opportunity

1. Although the laundry list of protected classifications is good to include, it is not technically required.

2. In addition, certain employers have sometimes been uncomfortable with certain of the categories, such as sexual orientation. This can be circumvented by simply putting "and other categories protected by state or federal law."

3. Some reference to reasonable accommodation and the manner in which it will be accomplished should also be included. Remember that in California the Fair Employment & Housing Act (FEHA) controls, not the Americans With Disabilities Act (ADA), so be careful not to place ADA language in the handbook that may not be entirely accurate.

C. Harassment

1. Do not make it a requirement that the initial complaint must be in writing. The EEOC prohibits it.

2. The complaint procedure must allow the victim of harassment to complain to someone other than the offending supervisor.

3. State law requires that there be a reference in the notice to the fact that the employee may file a charge with the Department of Fair Employment and Housing (so also include reference to the EEOC).

4. Consider referencing the existence of a hotline if you have multiple locations that would enable a harassed employee to bypass the local location's management structure and get to Human Resources or the owners, or some other person in the organization. A third-party hotline recipient, such as an attorney or Human Resources consultant, is not necessary.

D. Arbitration Provisions

1. Pros & Cons

a. Pros:

i. Money: The benefit of arbitration is that it can (?) save money. An average litigation through trial can cost between $100,000 and $200,000. The same case handled through arbitration might cost $50,000 through $100,000.

ii. Time: Arbitration can typically be resolved within six (6) months of claim. A jury trial may not be reached for approximately one (1) year after the filing of a complaint. Civil litigation can be longer if the claim proceeds through the administrative process.

iii. Certainty: Another potential benefit is that it avoids a jury trial, and thus the uncertainty of a jury. Juries may be predisposed in favor of employees and it is much safer to have a trier of fact who is a seasoned judge, or, sometimes, an attorney.

iv. NOTE: Arbitrators are also subject to the subtleties of subjectivity and can issue poor decisions.

b. Cons:

i. Review Process: Review of a bad arbitration decision is very limited, thus the "pros" outlined above could be all for nothing if the arbitrator makes a poor decision that would typically be "correctable" by appeal in the civil courts.

ii. Expense: Depending on length of arbitration, administrative fees, and facilities fee, costs could come close to or exceed those associated with lawsuits.

2. Who Can Be a Party: Typically, if the employer decides to have an arbitration agreement with its employees, the agreement should be required for all new hires as a condition of employment.

a. NOTE: The Courts have been considering the issue of whether an employer can condition employment based on an employee's refusal to sign.

b. Existing employees cannot be forced to sign an arbitration agreement. It also appears that an exchange of consideration must be given to an employee for the employee giving up the right to a jury trial. This would probably include additional compensation or benefits.

c. Employers cannot coerce existing employees into signing and the court will look to the "procedural" and "substantive" aspects of the agreement. The procedural aspects relate to the manner in which the employee was asked to sign the agreement, and whether any threats of retaliation were made.

3. Requirements for a Valid Agreement: In order to be enforceable, the agreement should contain the following:

a. The arbitrator cannot be restricted in awarding remedies pursuant to the statutes which would otherwise apply to the employee's claims;

b. There must be some reasonable amount of discovery available;

c. There must be a written award by the arbitrator which reveals the essential findings and conclusions;

d. The employee is not required to pay unreasonable costs or the arbitration fee or expenses directly associated with the arbitration. These are fees that would not normally be incurred by the employee should the employee desire to pursue a claim through the administrative process or through court;

e. There must be sufficient judicial review. This does not mean that the substantive award of the arbitrator is easily overturned; rather only in cases of arbitrator bias, clearly erroneous application of the law, or similar highly egregious situations;

f. The procedure cannot be unconscionable procedurally or substantively;

g. There must be a "modicum of bilaterality." This means that the employer cannot reserve for itself the right to sue the employee in court, but restrict the employee with arbitration;

h. Any unconscionable provisions of the agreement can be severed from the agreement by a court or an arbitrator, unless the unconscionability "permeates the contract."

i. The arbitration agreement should be separately issued to the employees and should not be a part of the employee handbook. The handbook is not a contract; the arbitration agreement is a contract, and the employer to be able to continue to modify the handbook as needed.

E. Collective Bargaining Agreement: Union employers may have negotiated an agreement with the union representative. If, so, those provisions should control unless they contain illegal provisions.

F. Privacy Claims

1. Medical/Personal Health Information: Several state and federal statutes protect the unauthorized use or disclosure of an individual medical or personal health information.

2. HIPPAA: Federal Privacy regulations under the Health Insurance Portability and Accountability Act (HIPAA) of 1996 went into effect on April 14, 2003.

3. Disclosures of any type of individually identifiable health information including staff medical records, disability claims, and client case files are considered Protected Health Information (PHI).

4. PHI for any purposes are highly regulated, and require either an authorization or notice and an opportunity for the participant to object or agree to the disclosure.

5. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requires that employers institute certain policies and procedures with respect to health information received or used by certain covered entities.

6. Employer Requirements Under HIPAA: If the employer receives any PHI, then the employer will have to jump through many compliance hoops, including, but by no means limited to:

a. Designating a privacy officer,

b. Fire-walling protected information from employees who should not have access to it,

c. Providing training on the employer's privacy policies and procedures, and

d. Establishing a complaint and discipline system.

7. The employer is also required to give the employees written notice of the employer's privacy policies, which should be posted in a central location, be included in employee handbooks, and be distributed by mail or company-wide memorandum to the employer's current employees.

G. Internet Usage

1. Most if not all computer systems in the workplace are company property.

2. The company should retain the ability to monitor and review an employee's operation of the computer systems.

3. Company monitoring has been challenged on grounds that it invades the individual's right of privacy.

4. A written policy would assist in reducing an employee's expectation of privacy.

5. Policy to Reduce Expectations of Privacy

a. This may be accomplished by disseminating a written policy that advises the employee that the company may access, intercept, read, review, copy, listen to and/or disclose any transmissions made through the company's computer system/network at any time without notice.

i. This includes private, confidential or personal transmissions, which may be on the company's network even if marked "confidential."

ii. Employees should not expect any privacy in transmissions using the network, and if privacy is sought, the employee should not use the network.

b. Eliminate passwords, monitor their usage, or indicate that the use of passwords does not relieve the employer of the ability to monitor.

H. Personal Items within Company Property:

1. An employee may have an expectation of privacy in personal items maintained within company property (i.e., desks, lockers, e-mails, company-owned vehicles and equipment, telephone systems, etc.).

2. Reduction of expectation of privacy will help the Company in its ability to monitor for employee misconduct or in investigations.

3. Reduction of expectation of privacy should be in policies similar to those discussed in the internet section above.

4. Company should not allow employees to maintain their own passwords or locks on company property. Employees should either be assigned passwords or locks, or at least should be required to store the password, key, or combinations with a particular agent.

I. Outside Employment - Be careful not to overly restrict employees from outside activities or employment. You may prohibit an employee from working in a competitive activity or one that takes away from the employee's work on behalf of the company. You cannot, however, entirely prevent an employee from moonlighting or engaging in outside activities which you might otherwise not want them to perform (such as something you might consider immoral), unless it directly impacts on your company.

J. Tardiness/Attendance - There are mixed opinions on whether to have rigid tardiness policies. It sometimes can make it easier to terminate an employee if he has violated a rigid tardiness policy. On the other hand, you may want to discipline an employee more frequently (or perhaps less frequently) for tardiness. Failure to adhere to your rigid policies might subject you to a discrimination claim later, on the ground that you more harshly disciplined an employee for violation of such rigid policies, and did not do so for another employee in another category (discriminating against older workers more severely than younger workers, e.g.).

K. Performance Reviews - If you are going to include references to, for example, annual performance reviews, it is critical that you stick to the schedule and actually perform the reviews. You should have a tickler system that requires follow-up if a review is not completed.

L. Time Sheets - Time sheet maintenance policies should be set forth clearly in the handbook. Employees need to know that they have to sign in and out for their meal breaks (but not rest breaks) and you can make it clear that improprieties involving time sheets will subject an employee to disciplinary action.

M. Dress Code - Employers have a fair amount of flexibility in requiring a certain type of dress code. They may restrict the use of nail polish, excessive jewelry, visible tattoos and, as one client has, a "no visible hickey" policy. Employers need to ensure that if they require a certain type or color of outfit, that it be as generic as possible. Particular restrictions on the nature of the outfit could force the employer to pay for the outfit.

N. Grievance Procedure - Grievance procedures should be kept broad. There should not be a specific step approach to grievance procedures unless you are in the public sector. Many employers do not adhere rigidly to such detailed policies and this will be a ripe opportunity for plaintiff's lawyer to demonstrate that the employer did not follow their procedures in properly disciplining an employee. There is no requirement for detailed grievance procedures, although occasionally EPLI carriers may require them.

O. Alcohol and Drug Abuse - Policies often have broad language prohibiting certain types of conduct related to alcohol or drugs in the workplace. Many policies neglect to have a procedure in place for the company to require testing in certain circumstances. At a minimum, the company should have reasonable suspicion testing mandated in the policy and post-accident testing when the employee is reasonably believed to be "a" cause of the accident.

1. Past policies often provide that employees will always be tested if they are involved in an accident, but this may be an invasion of privacy if the employee is not reasonably suspected of being "a" cause of the accident. For example, if an employee is a passenger in a vehicle involved in an accident, it is not likely that that employee would be suspected of being a cause of the accident. In that circumstance, it would not be advisable to require testing of that employee even though he was "involved" in the accident.

2. Remember that employers with 25 or more employees are subject to Labor Code sections 1025-1028, which allows employees to take time off for entering rehabilitation programs (but only if the employee comes forward first with the request, before he or she is caught).

P. Workplace Violence - Employers are required by law to have a workplace violence policy in place. Failure to have the policy in place could subject the employer to a negligent supervision claim.

Q. Fraternization - Employers may have a policy that prevents supervisors from dating subordinates. The rules are somewhat different for employee who are not in supervisory roles with each other. Generally, employers may not prevent off-duty conduct such as dating by co-workers.

EMPLOYEE RELATIONS POLICY WITH ACKNOWLEDGMENT

A. POLICY AGAINST DISCRIMINATION.

_____ (the "Company") is committed to providing a work environment that is free of discrimination. In keeping with this commitment, the Company maintains a strict policy prohibiting unlawful discrimination. This policy applies to all employees of the Company, including supervisors and non-supervisory employees. The policy also, applies to non-employees of the Company including clients, customers, vendors and any other person doing business with the Company.

All aspects of employment with the Company will be governed on the basis of merit, competence and qualifications and will not be influenced in any manner by an individual's race, ancestry, color, religion, national origin, marital status, sex (including sexual harassment and gender identity), sexual orientation, disability (physical or mental including HIV/AIDS diagnosis), pregnancy, medical condition (cancer and genetic characteristics), age or exercising the right to any legally provided leave of absence in the application of any policy, practice, rule or regulation.

All decisions made with respect to recruiting and hiring, evaluations and promotions for all job classifications will be based solely on individual qualifications as related to the requirements of the position. Likewise, all other personnel matters such as compensation, benefits, transfers, lay offs, training, educational opportunities and programs will be administered free from any illegal discriminatory practices.

B. POLICY AGAINST HARASSMENT, INCLUDING SEXUAL HARASSMENT.

The Company is also committed to providing a work environment that is free of harassment, including sexual harassment.

Sexual harassment includes:

1. Unwanted sexual advances;

2. Offering employment benefits in exchange for sexual favors;

3. Making or threatening reprisals after a negative response to sexual advances;

4. Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters;

5. Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes;

6. Verbal sexual advances or propositions;

7. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes, or invitations; and

8. Physical conduct: touching, assault, impeding or blocking movement.

C. COMPLAINT AND INVESTIGATION PROCEDURE.

Any form of discrimination or harassment, including sexual harassment, is absolutely prohibited. Any incident of possible discrimination or harassment should be brought immediately to the attention of the Human Resources Department of the Company which will thoroughly investigate the matter in confidence. After reviewing all the evidence, the Company will make a determination concerning whether reasonable grounds exist to believe that harassment has occurred.

Disciplinary action, up to and including discharge, will be taken against any employee who is found to have engaged in harassment.

No employee shall be subjected to any form of retaliation for reporting any violation of this policy truthfully and in good faith.

D. HARASSMENT BY NON-EMPLOYEES.

In addition, the Company will take all reasonable steps to prevent or eliminate sexual harassment by non-employees including customers, clients and suppliers who are likely to have workplace conduct with our employees.

EMPLOYEE RELATIONS POLICY ACKNOWLEDGMENT

I have read and received a copy of the Company's Employee Relations Policy, including the policies against discrimination and harassment, including sexual harassment, and fully understand my obligations and responsibilities as outlined therein.

Signed: _____ Date: _____

Signed: _____ Date: _____

Witness: _____ Date: _____

MEAL AND REST PERIOD POLICY

Full time employees receive a thirty (30) minute unpaid lunch period which must be taken no later than five (5) hours after commencement of work. Part time employees will be advised of the amount of time for their unpaid meal period. The Company permits and authorizes two ten (10) minute rest breaks: one in the morning and a second one in the afternoon. Check with your supervisor for the appropriate time to take your rest breaks.

Meal periods and breaks may not be waived to leave early nor may they be consolidated for a longer break or meal period.

Various factors such as work loads and staffing needs may require variations in an employee's starting and quitting time and the total hours worked each day or week. Employees may be required to work overtime and/or weekend hours on a rotating basis. The Company maintains its right to assign employees to jobs other than their usual assignments when required for legitimate business reasons.

REPORTING VIOLATIONS OF REST OR LUNCH BREAKS

Any employee who feels or believes they have been denied the opportunity to take a rest or lunch period as provided by law should promptly report the facts of the incident or incidents, and the names of the individuals involved, to your supervisor or the Company's President. The Company will not retaliate against you for filing a complaint and will not tolerate or permit retaliation by management employees or co-workers.

After enforcement of this policy has been completed, management shall monitor the principal parties involved. If an employee feels that there has been reprisal or retaliation for reporting the violation, they should report such reprisal or retaliation in the same manner as the original complaint. Management will investigate all such allegations and take appropriate action. Any reprisals, or retaliation in any manner or form shall be grounds for immediate dismissal.

CELLULAR PHONE POLICY

Cellular phones provided by the Company are generally to be used only for Company business. Personal telephone calls on cellular phones owned by the Company are to be kept to a minimum. Employees may not use cellular phones to conduct business for others or themselves.

Employees are not allowed to use any cellular phone for non-business purposes or in an illegal, illicit or offensive manner.

In order to avoid the disruption caused by cellular phone usage in the Company, the Company has adopted the following policy regarding cellular phones:

1. Please be considerate of the Company's clients and your co-workers and turn your cellular phone to "silent" or "vibrate" when you are in a meeting with either clients or co-workers.

2. In all situations, the ring style on the cellular phone should not be any louder than necessary to alert you to an incoming call.

3. If you have turned off the ringer, but still detect an incoming call, please move immediately to a location that will not disrupt the Company's operations, annoy clients or co-workers before responding to the call.

4. While using a cellular phone, the level of your voice should not be of such volume as to cause a disruption to the Company's operations.

5. Unless an emergency occurs, personal calls should not be of any significant duration.

6. Confidential information is not to be discussed over cellular phones.

7. All Company policies that apply to regular telephones and other Company property apply to cellular phones.

Employees are to use cellular phones in a safe manner and are not permitted to use cellular phones or any other hand held device, pagers, digital assistants, laptops, or any other electronic communicative devices while operating a vehicle, unless the employee is utilizing a "hands-free" device. Employees may not use cellular phones, even with a "hands-free" device, in prolonged conversations or in heavy and/or slow moving traffic.

Employees will use the long-distance carrier designated by the Company. Employees will be billed the air time charges for all personal calls. Phone calls are not to be forwarded to cellular phones. Cellular phone calls are not to be forwarded to other phones.

In all cases, cellular phones and accessories provided by the Company (e.g. battery chargers and hands-free devices) remain Company property. To the extent permitted by applicable law, employees will be held responsible for lost or stolen cellular phones, etc., belonging to the Company. Employees must immediately report lost or stolen cellular phones, etc.

Employees may be disciplined for violating the cellular phone policy.

SAMPLE EMPLOYEE HANDBOOK TABLE OF CONTENTS

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Employee Statement.

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