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Employment Law
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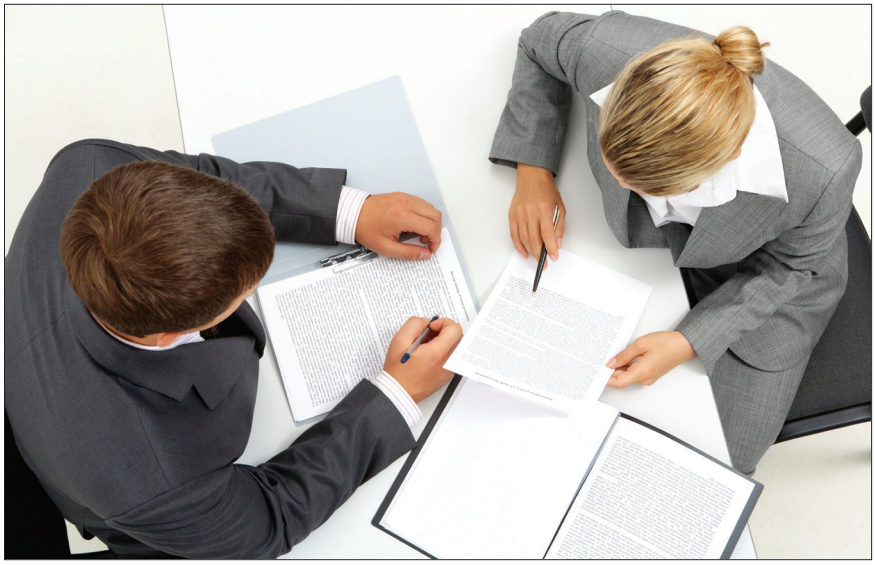
Common mistakes in employee handbooks



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Many employee handbooks are riddled with errors – they contain rules that are illegal, or that are unfair or confusing to employees, or that don't protect the employer in ways they should.

As a general rule, companies should have their handbooks reviewed by an attorney on an annual basis to make sure they're appropriate, current, and in compliance with the law. And employees who are concerned about provisions in a handbook shouldn't hesitate to seek legal advice.

Here's a look at some common issues, mistakes and problems that arise in employee handbooks:

Overtime. A number of handbooks have statements such as, "Overtime will not be paid unless it was authorized in advance by a manager." This is technically illegal. A company has to pay for any overtime actually worked, whether it was authorized in advance or not. A company can adopt a rule against unauthorized overtime, and punish workers who violate it in other ways, but it can't refuse to pay them.

Medical leave. Some handbooks put a cap on medical leaves of absence, such as three months. In general, this is illegal. The federal Americans With Disabilities Act requires that each situation be considered on an individual basis, without regard to arbitrary caps.

Handbooks should also clearly spell out whether employees can exhaust their paid time off before taking leave under the Family and Medical Leave Act, or whether their paid leave counts toward their FMLA leave. A lot of disputes arise when this detail is left unclear.

Electronic devices. If employees are given laptops or cell phones, or allowed to use company e-mail or voicemail, a handbook should state whether the company can access the information stored on them, and whether employees have an expectation of privacy if they use the

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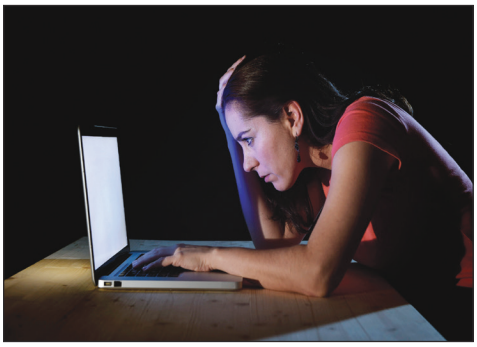
EMPLOYMENT LAW BRIEFS

Late-night emails might entitle workers to overtime pay

These days, many employees feel like they're never really "off the clock." They're expected to check e-mails at home, and occasionally to respond to emergency text messages from their boss or co-workers.



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But the truth is, many workers in this situation might literally be "on the clock." If they're expected to check texts and e-mails at night in addition to working full-time during regular hours, they might be eligible for overtime.

For example, a group of salespeople at T-Mobile stores brought a lawsuit complaining that they had been given BlackBerry devices and were expected to answer e-mails and texts from other staffers and from customers outside of regular business hours. T-Mobile settled their claims for overtime pay.

These types of lawsuits could become much more common now that President Obama has proposed making workers earning up to $50,440 – including salaried workers and those classified as "managers" – eligible for overtime, up from the current threshold of $23,660. This change would make overtime available to a large number of employees who are currently expected to be available around the clock.

Employees are being asked to waive class actions

A "class action" lawsuit is brought on behalf of a large group of people who have a similar complaint. Class actions are not uncommon in employment law, especially for wage-and-hour violations. While a single individual's unpaid wages might not be large enough to make it worth bringing a lawsuit, a group of employees might be able to share costs and make the effort cost-effective.

Recently, employers have been trying to stop class actions by requiring workers to waive their right to bring one as a condition of employment. Back in 2012, only 16% of large employers required class-action waivers, but by last year that number had skyrocketed to 43%.

Are these waivers legally valid? That's not entirely clear.

A few years ago, the U.S. Supreme Court ruled that a telecom company's sales agreements could require customers who wanted to get phone service to waive their right to bring a class action. Although that case didn't involve employment law, some people thought it was an indication that class actions could be waived by employees as well.

However, the National Labor Relations Board has suggested that employee class-action waivers might violate federal labor law. So the issue is still in doubt.

New mothers have a right to pump breast milk at work

Many employers are still unaware that new mothers have a legal right to express breast milk at work.

Under the federal Fair Labor Standards Act, employees must be allowed reasonable break time to pump breast milk for nursing children. In general, employees are entitled to do this until the child is a year old, in a private place other than a bathroom. Discriminating against a worker because of her need to breastfeed might also be grounds for a sex discrimination lawsuit.

Many states have similar laws, and in some cases these state laws provide more rights to new mothers than the federal law.

DNA tests are illegal even to investigate misconduct

A federal law called GINA (the Genetic Information Nondiscrimination Act) prohibits businesses from collecting genetic information, such as DNA samples, from workers. The main purpose of the law is to stop employers from firing workers whose predisposition to certain diseases might drive up the company's health-care costs.

But a recent case in Georgia shows that the law applies even if a company collects such information for nondiscriminatory reasons, such as to investigate misconduct.

In that case, an unidentified employee at a food distribution company was repeatedly defecating in various spots throughout one of its warehouses. The company suspected the worker was doing this to protest certain company policies.

To try to catch the culprit, the company ordered a number of workers to submit to cheek-swab genetic tests, so it could compare the workers' DNA with the DNA it had found on the floor.

In the end, none of the swabs matched, the culprit was never caught, and nobody was ever disciplined. But several employees sued under GINA, claiming that having to undergo the testing was humiliating and illegal.

A federal judge said the workers could sue, because GINA applies even if the employer is not using the genetic information for discriminatory purposes.

Some common mistakes in employee handbooks

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devices or systems for personal purposes. If the handbook doesn't make this clear, it can lead to very sticky situations down the road.

Harassment. Most employee handbooks include an anti-harassment policy that explains what harassment is, the potential consequences, and what workers should do if they see it happen. But some handbooks discuss only *sexual* harassment, without being clear that the company also doesn't tolerate harassment based on race, religion, ethnicity, disability, or sexual orientation. That's a problem.

Some handbooks make the mistake of saying that "unlawful harassment" is prohibited. But a business should prohibit *any* unwelcome conduct, even if it doesn't amount to a violation of the law, so it can stop the conduct before it becomes unlawful.

One legal problem for employers is that if a policy prohibits only harassment that's unlawful, then any time an employer investigates a complaint and determines that the harassment policy has been violated, it's basically admitting that something unlawful happened. That can make it harder for an employer to defend a lawsuit.

Discipline. Some companies have strict discipline policies that say what will happen if there's a first infraction, a second infraction, and so on. These are generally a bad idea.

In most workplaces, each situation is different and requires an individualized response. A rigid discipline policy boxes an employer in, and can result in punishments that are too harsh in some cases and too lenient in others. And if employers ever deviate from the policy in the handbook, employees may claim discrimination.

Companies are usually better off simply listing the types of actions they *may* take (such as a warning, a suspension, or termination), without saying what they will do in any given situation.

Rules that violate state laws. Companies that operate across state lines (or that simply hire someone who works remotely in another state) often forget that their handbooks have to reflect different state requirements. For instance, some states have medical leave laws that are more generous to workers than the federal Family and Medical Leave Act. And some states prohibit employers from capping the accrual of vacation time or adopting "use it or lose it" vacation policies.

Rules that violate federal laws. Handbook provisions concerning confidentiality, conflicts of interest, and attendance can violate federal labor laws that allow workers to organize and work together to improve their job conditions.

For example, some confidentiality provisions prohibit employees from disclosing any details about the company to outsiders, talking about co-workers behind their back, revealing their salaries, or discussing work issues with fellow employees without a specific business reason. The National Labor Relations Board has ruled that provisions similar to these violate workers' rights.

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And while companies can prohibit employees from working on the side for a competitor, broad conflict-of-interest policies that forbid workers from doing anything that's "not in the best interest of the company" may also be illegal. The same is true for attendance policies that prohibit "walking off the job."

Confidential information. Businesses should never put confidential information in a handbook, since the handbook might be circulated outside the company by an employee or former employee.

Acknowledgements. It's a good idea for employers to have employees acknowledge in writing that they received the handbook (and sign a similar acknowledgement whenever the handbook is updated).

Revisions. Handbooks should generally say that they're not written in stone and that the employer can change them from time to time as necessary. However, if a handbook says that a worker's employment is "at will," then the employer might want to specify that *this* portion of the handbook can't be changed unless there's a separate agreement.

Companies typically don't want to revise their handbooks frequently, so it's a good idea to leave out any information that might quickly go out-of-date. For instance, instead of specifying the IRS's current business mileage rate, a handbook can simply say that employees will be reimbursed at the IRS's then-current rate.

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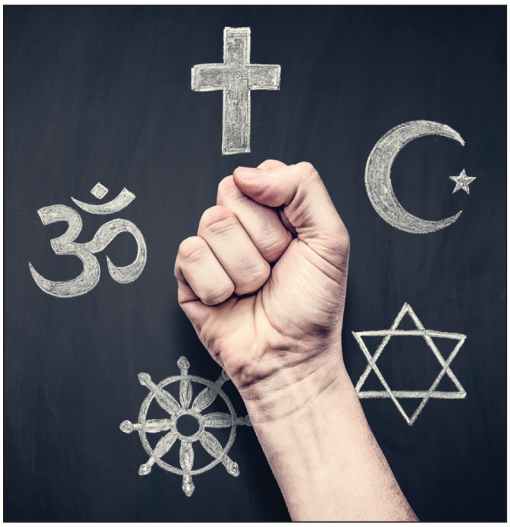
It's easier to sue companies for religious discrimination

Two recent court cases have made it easier for employees to bring lawsuits claiming that they were discriminated against because of their religion.

In one case, the U.S. Supreme Court decided that a 17-year-old Muslim in Oklahoma could sue the Abercrombie & Fitch clothing chain for denying her a job because she wore a headscarf for religious reasons.



Samantha Elauf claimed she was rejected for a sales job at a store in Tulsa because her headscarf violated the chain's dress code, which calls for an "East Coast preppy" image.

Abercrombie argued that she couldn't prove she was discriminated against because the managers who interviewed her never asked her about the headscarf, and she never specifically told them that she was a Muslim and would need a religious accommodation to wear it while working.

But the Supreme Court said Samantha didn't have to specifically request a religious accommodation during the interview. All she had to prove was that the Abercrombie managers *assumed* she might need a religious accommodation, and that this was a factor in their decision not to hire her.

In a different case in Michigan, a dark-skinned employee of Iraqi descent claimed he was harassed and unfairly disciplined by supervisors who incorrectly believed he was a Muslim.

Although he wasn't, he claimed he was discriminated against anyway, with one manager telling him he wouldn't be working on certain jobs because he was "Taliban."

The company argued that he couldn't sue for religious discrimination because he wasn't discriminated against on the basis of his *actual* religion. But a federal court sided with the employee, and said discrimination could still occur even if the managers' assumptions turned out to be incorrect.