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DRAFTING EMPLOYEE HANDBOOKS AND HANDBOOK TRAPS*

presented by
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Background

1. Realities of Handbooks
 - a. Some policies legally required
 - b. Avoid employee relations problems
 - c. Avoid legal claims
 - d. Provide instruction

Preliminary Issues

1. Length
2. Tone
3. Distribution Method
4. *TRAP: Acknowledgment*
5. Training

Disclaimer/Introduction

1. At-will employment
 - a. *TRAP for certain jurisdictions: Stand-alone policy required in some jurisdictions*
2. No-contract language
3. Reservation of rights
4. No separate agreement
 - a. In writing, by high level official
5. Superseding language
6. More than one state

Social Media

1. Prohibition on using the Company's technology or conducting social networking during working hours (unless for employer)
 - a. *TRAP: Ignoring the initial issue*
2. Prohibition on disclosing the Company's confidential or proprietary information
3. Prohibition on supervisors' commenting on subordinates (even if not by name)
 - a. Question: Allow supervisor and subordinate to be "friends"

Social Media

4. Requirement that individual state that he or she is not speaking for employer when engaging in personal social networking
5. Compliance with Intellectual Property rights, such as not copying copyrighted materials without permission
6. Possible restrictions on disparagement (but subject to reality that certain “disparagement” is protected, particularly if personal social media)

Social Media

7. Possible restrictions on postings that may reflect negatively on employer (but subject to reality that certain “negative” postings may be protected, particularly if personal social media)
 - a. *TRAP: Limitations on disparagement*
8. Application of Conflicts of Interest Policy
9. Application of employer’s harassment, discrimination and retaliation policies

Equal Employment Opportunity

1. General EEO Statement
 - a. Not just sex
 - b. Not just harassment
 - c. Inclusion of AA language
2. All relevant protected classes
 - a. Membership in any other “protected group” language
3. Application to everyone
 - a. All employees (including officers, managers, etc.)
 - b. Non-employees with whom do business
 - c. E-mail, Internet, Social Media

Equal Employment Opportunity

4. Non-harassment
 - a. Sexual
 - b. Other
 - c. Examples
 - d. Application to non-verbal
 - e. Application to non-work
5. Reasonable accommodations
 - a. Disability and religion
 - b. To whom make accommodation request

Equal Employment Opportunity

6. Retaliation

- a. *TRAP: Failure to mention in sufficient detail*
- b. Stand alone
- c. Who protected
- d. Retaliatory actions

Equal Employment Opportunity

7. Complaint Procedure
 - a. Types of claims covered (by implication, not covered)
 - b. Employees/non-employees
 - c. Multiple people to complain to (diversity)
 - d. Assurances
 - i. Full and fair investigation
 - ii. Confidentiality
 - iii. Corrective action
 - iv. No retaliation
 - e. Written appeal process

Equal Employment Opportunity

8. Sanctions

- a. Severe disciplinary action
- b. Applies to everyone
- c. Exempt/non-exempt issue
 - i. TRAP: Suspending exempts without pay in less than full week increments*

Wage and Hour and Compensation

1. Classification

- a. Exempt vs. Non-Exempt
- b. Full-Time vs. Part-Time vs. Temporary

2. Work Week

- a. Number of hours
- b. Number of days
- c. Regular business hours

Wage and Hour and Compensation

3. Pay Period

- a. Weekly vs. Bi-Weekly
- b. Begin and end
- c. Inclusion of OT
 - i. *TRAP: Failure to state when OT paid*
- d. When paid

4. Telecommuting

- a. Length of employment
- b. Length of no discipline
- c. Positions ineligible for telecommuting

Wage and Hour and Compensation

5. Deductions from exempt employee's pay
 - a. *TRAP: Failure to include!*
 - b. Prohibit improper deductions
 - c. Complaint mechanism
 - d. Reimburse for improper deductions
 - e. Good faith commitment to future compliance
 - f. Lose safe harbor if
 - i. Improper deductions following complaint
 - ii. No reimbursement for improper deductions

Wage and Hour and Compensation

6. Recording Time Worked
 - a. How is time recorded?
 - b. Exempts required?
 - c. Recording time of another or another recording your time
7. Overtime
 - a. Eligibility
 - b. When OT applies
 - c. Right to mandate
 - d. Prior approval
 - e. PTO

Wage and Hour and Compensation

8. Payment of non-exempt employees

a. Meal Breaks

- i. 30 minutes unpaid
- ii. Must take full 30 minutes
- iii. Cannot break up 30 minutes
- iv. Notify supervisor if:
 - Don't take break
 - Don't take full 30 minutes
 - Work during break
- v. *TRAP: Failure to adjust time sheets*

Wage and Hour and Compensation

8. Payment of non-exempt employees (continued)
 - b. Rest Breaks
 - i. Define number
 - ii. Paid
 - iii. Cannot be combined
 - iv. No additional pay given if not taken
 - c. Breaks to express breast milk
 - i. Private place (not rest room)
 - ii. Not have to be paid

Wage and Hour and Compensation

8. Payment of non-exempt employees (continued)
 - d. Other issues
 - i. Preliminary/Postliminary activities
 - ii. Uniforms
 - iii. Travel time
 - iv. Remote work
 - v. On call

Wage and Hour and Compensation

9. Correction Procedure

a. Notify if

- i. Work before log in
- ii. Work after log off
- iii. Skip meal break/take less than 30 minutes/work during
- iv. Work outside work hours or at home

Wage and Hour and Compensation

10. Complaint Procedure

- a. Improperly paid
- b. Asked to work off the clock
- c. Contact identified official
- d. Investigation
- e. Corrected next paycheck
- f. No retaliation
- g. If not satisfied

Leaves of Absence

1. Types of Leaves
 - a. FMLA
 - b. Medical
 - c. Military
 - d. Personal
 - e. State required

Leaves of Absence

2. FMLA

- a. Eligibility
- b. Purposes of leave
- c. Serious health condition
 - i. TRAP: Must include definition of SHC*
- d. Notice
- e. Certification (within 15 days)
- f. Insurance Continuation

Leaves of Absence

2. FMLA (continued)

- g. Substitution of paid benefits for unpaid leave
 - i. Required/prohibited/reserve certain # of days
 - ii. STD/WC/State disability payments
 - iii. Not more than 100 percent of payment
- h. Return to work
- i. Organization's responsibilities
 - i. DOL contact information

Leaves of Absence

3. Key Issues for Non-FMLA, Non-Military
 - a. Eligibility
 - i. *TRAP: Leaving too open-ended*
 - ii. Full-Time vs. Part-Time
 - iii. Waiting period
 - iv. Discretion of who?
 - v. Minimum/maximum days/weeks
 - b. Circumstances
 - i. Medical – leave for whose illness
 - ii. Personal – any specific criteria or for any reason

Leaves of Absence

3. Key Issues for Non-FMLA, Non-Military (continued)
 - c. Notice
 - i. How much
 - ii. To whom
 - d. Documentation
 - i. Reason for leave for medical condition to self/others
 - ii. Return to work certification

Leaves of Absence

3. Key Issues for Non-FMLA, Non-Military (continued)
 - e. Payment during leave
 - i. Paid vs. Unpaid
 - ii. If use benefits, never more than 100%
 - iii. Eligibility for salary increases
 - f. PTO
 - i. Use required, prohibited, reserved
 - ii. Accrual during leave

Leaves of Absence

3. Key Issues for Non-FMLA, Non-Military (continued)
 - g. Insurance coverages
 - i. Contributions continued
 - ii. For how long
 - h. Maximum leave
 - i. *TRAP: Setting an absolute maximum time out of work*
 - i. Reinstatement

Leaves of Absence

4. Key Issues for Military
 - a. In accordance with federal and state law
 - b. Notice
 - i. As much as possible, but not required
 - ii. Oral or written
 - c. Insurance coverages
 - i. State laws

Leaves of Absence

4. Key Issues for Military (continued)
 - d. Compensation
 - i. Not required
 - ii. Exempt: full week
 - e. PTO
 - i. Can't require use
 - f. Return to work

Discipline

1. Reaffirmation of at-will employment
2. Progressive discipline
 - a. Articulation of steps vs. fluid approach
 - b. Exceptions
 - i. Skipping steps
 - ii. Eliminating steps
 - c. Reasons for exceptions
3. Causes for immediate discharge

Employee Conduct and Expectations

1. Introductory Period
 - a. Nomenclature
 - b. Length
 - c. No guarantee of employment
2. Confidentiality
 - a. Kinds of information protected
 - b. Rules about disclosure
 - i. During/after employment
 - c. Consequences of violation
 - d. Return of material

Employee Conduct and Expectations

3. Solicitation and Distribution of Literature
 - a. Absolute prohibition by non-employees
 - b. Solicitation by employees
 - i. Only during non-work time of all involved
 - c. Distribution by employees
 - i. Only in non-work areas during non-work time of all involved
 - d. Define non-work areas/times
 - e. Sanctions
 - f. Bulletin boards

Employee Conduct and Expectations

4. Electronic Communications Systems
 - a. E-mail, Internet, computer
 - i. Business v. Personal Use
 - *TRAP: Stating business use only*
 - ii. EEO issues
 - iii. Monitoring issues
 - b. Instant messaging

Employee Conduct and Expectations

4. Employee Conduct and Expectations (continued)
 - c. Searches
 - i. Absolute right to search person or property on premises
 - ii. What can be searched
 - iii. When searches can occur
 - iv. Sanctions for non-compliance

Paid Time Off

1. Holidays
 - a. Fixed/floating
 - b. Eligibility
 - i. Full-time/Part-time
 - ii. Waiting period
 - iii. If out on LOA
 - c. Pay for working holiday
 - i. Exempt
 - ii. Non-exempt
 - d. Any other restrictions

Paid Time Off

2. Vacation/Sick/Personal Time
 - a. Days per year
 - b. Eligibility
 - i. Full-Time/Part-time
 - ii. Waiting period
 - iii. If out on LOA

Paid Time Off

2. Vacation/Sick/Personal Time (continued)

c. Accrual

- i. Calendar or anniversary basis
- ii. Special rules for first year
- iii. Accrue during LOA?

d. Minimum increments

e. Carrying over

f. Pay out on termination

Paid Time Off

3. Jury/Witness
 - a. Required?
 - b. Days/year
 - c. Eligibility
 - i. Full-time/Part-time
 - ii. While on LOA
 - iii. Waiting period
 - d. Exempt employees

Paid Time Off

4. Bereavement

a. Definitions

i. Who's eligible

b. Days per year

c. Eligibility

i. Full-time/Part-time

ii. Waiting period

iii. While on LOA

d. Minimum increments

Benefits

1. List
 - a. Group medical and dental
 - b. Group life and AD&D
 - c. STD
 - d. LTD
 - e. Savings and investment plan
2. Plan documents disclaimer
 - a. *Trap: Failure to include*
3. General terms, conditions and restrictions

Acknowledgment

1. Require receipt
2. Not require read

Health and Safety

1. Workplace Violence
 - a. Examples
 - b. Criminal prosecution
 - c. Employees/non-employees
 - d. Subject to immediate discharge
 - i. Exempt/non-exempt

Health and Safety

2. Substance abuse
 - a. Fitness for duty
 - b. Testing
 - i. Circumstances
 - c. Any permissible consumption?
 - d. Possession of alcohol
 - e. Issue of employees taking prescription/OTC drugs
 - f. Self-identification
 - g. EAP

Health and Safety

3. Smoking
 - a. Where allowable
 - b. Restrictions
4. Workers' Compensation
 - a. To whom
 - b. By whom

Leaving Employment

1. Resignation
 - a. Written
 - b. Minimum number of days
 - c. Present during notice period
 - d. Eligibility for accrued/unused PTO
 - e. Forfeiture of PTO/ineligible for rehire

Leaving Employment

2. Job Abandonment

- a. Number of consecutively-scheduled work days without reporting
- b. Forfeiture of PTO
- c. Ineligible for rehire

Leaving Employment

3. Discharge
 - a. Eligibility for accrued/unused PTO
 - b. Rehire
4. References
 - a. Neutral
 - b. Forwarded to HR
5. Unemployment Compensation
 - a. Must apply to be eligible
 - b. State makes decision

Appearance

1. What is the policy?
2. Examples of acceptable
3. Examples of not acceptable
4. Gender neutral
 - a. *TRAP: Transgender issue*

Outside Employment

1. Discouraged/prohibited
2. If allowed, prior approval
3. Must not interfere
4. Never a competitor

Appraisals

1. Do them?
2. When?
3. Explain purpose
4. Link to pay

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1. **Michael S. Cohen** concentrates his practice in the areas of employment law training and counseling. Mr. Cohen has trained and counseled employers throughout the country on subjects including harassment prevention; workplace diversity; discipline and discharge; hiring and recruiting practices; performance evaluations; FMLA, ADA and FLSA compliance; leave of absence policies; performance management; workplace privacy; sexual orientation and gender identity in the workplace; substance abuse testing; workplace violence; records retention; conducting background checks; teens in the workplace and managing attendance problems. He has conducted trainings for executives, directors, managers, supervisors and employees in many industries, including financial services, healthcare, pharmaceutical, manufacturing, retail, real estate development, law firms and human services. Mr. Cohen also has conducted trainings for executives, deans and faculty in several institutions of higher education and secondary education. He has conducted more than 150 trainings in the last year.
2. Mr. Cohen has conducted investigations into claims of harassment and discrimination and has drafted employee handbooks, employment agreements, noncompete agreements and post-termination agreements. He has represented clients throughout the country in EEO and other administrative proceedings.
3. Mr. Cohen has been cited as a national authority on employment issues by *The New York Times*, *The Associated Press*, *USA Today*, *MSNBC.com*, *The New York Daily News*, *New York Newsday*, *The San Francisco Chronicle*, *Law National*, *Law.com*, *HR Magazine*, *HR Executive Magazine*, *HR Executive Online*, *SHRM On-Line*, *Employment Law 360*, *Inside Counsel Magazine*, *What's Working in Human Resources*, *Workforce Management Magazine*, *Human Rights Campaign On-Line*, *Yahoo! Sports*, *The Sporting News*, *The Newark Star-Ledger*, *The Houston Chronicle*, *The New Orleans Times-Picayune*, *The Pittsburgh Tribune-Review*, *The Syracuse Post-Standard*, *The Ann Arbor News*, *The Harrisburg Patriot News*, *The Mobile Press Register*, *The Flint Journal*, *The Desert Sun*, *The Courier-Post*, *The Honolulu Advertiser*, *The Stamford Advocate*, *The Huntsville Times*, *AM New York*, *The Workplace Substance Abuse Advisor*, *Legal Issues in Collegiate Athletics*, *Talent Management*, *BusinessInsurance.com*, *AZcentral.com*, *Fort Worth Star Telegram*, *Honolulu Star-Bulletin*, *The Columbus Dispatch*, *The Myrtle Beach Sun News*, *Richmond Times Dispatch*, *Detroit News and Business & Legal Reports, Inc.* He has been a regular guest lecturer on human resources issues at West Chester University for its Masters of Science in Administration program. He also is a member of the board of editors for the *Privacy Law Journal* and of the *SHRM PA State Council Diversity Committee*.
4. Mr. Cohen is a 1997 *magna cum laude* graduate of Temple University Beasley School of Law and a *cum laude* graduate of the University of Pennsylvania.
5. **Areas of Practice** - Employment Law;
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 - a. Speaker, "Employment Law Update and Harassment Prevention and Correction," Association of Legal Administrators Annual Conference, New Orleans, May 19, 2009 (#1 ranked speaker)
 - b. Speaker, "Harassment Prevention and Correction," Delaware Valley Human Resources Summit, Philadelphia, October 3, 2008 (#1 ranked speaker of conference)
 - c. Speaker, "Hiring and Interviewing and It's Not Just a Game: Examining Employment Law Subjects Through the World of Sports," SHRM National Staffing Conference, Las Vegas, Nevada, April 29-30, 2009
 - d. Speaker, "Complying with Major Discrimination Laws and Union Awareness," Pennsylvania Chamber of Commerce, Valley Forge, Pennsylvania, April 21, 2009
 - e. Speaker, "Sexual Orientation and Gender Identity Issues In The Workplace," SHRM National Employment Law and Legislative Conference, Washington D.C., March 9, 2009