

# Developing and Maintaining Effective Employee Handbooks




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# Developing A Handbook

## Essential Policies

- ▼ Mission Statement
  - ▼ At-Will Employment
  - ▼ Anti-Discrimination, Anti-Harassment, Anti-Retaliation
  - ▼ Reasonable Accommodations
  - ▼ FLSA Safe Harbor
  - ▼ Attendance/Leaves of Absence
  - ▼ Compensation
    - ▼ When
    - ▼ How
    - ▼ Overtime
  - ▼ Benefits
  - ▼ Vacation and Sick Leave
  - ▼ Remote Work
  - ▼ Conduct
    - Expectations
    - Rules
    - Discipline
  - ▼ Drug and Alcohol-Free Workplace
  - ▼ Tobacco Free Workplace
  - ▼ Technology
  - ▼ Social Media
  - ▼ Security
  - ▼ Safety
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# Developing A Handbook

## Essential Considerations

- ▼ Use as a Communications Tool
- ▼ Aggressive or Conservative Approach to Employer Rights
- ▼ Minimalist or All-Inclusive Approach
- ▼ Size of the Employer
  - ▼ Will weigh in determining size of handbook and mandatory policies
- ▼ Format and Commitment to Updating
  - Will there be an online/intranet version?
- ▼ Geography
  - ▼ More than one location? Are there unique state or municipal laws that may apply?
- ▼ Types of Employees to be Covered

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## Mission Statement

- ▼ May be an appropriate first substantive page of any handbook or similar communication
- ▼ Articulate:
  - ▼ Who we serve
  - ▼ How we serve them
  - ▼ Which principles inform our mission, culture
  - ▼ Necessity of each employee's commitment to that mission, culture

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## Employment at Will

- ▼ Consequences:
  - ▼ If there is no Employment at Will clause, the handbook *may* be construed as a contract
- ▼ NLRB:
  - ▼ Employment at will clause may violate the NLRA if it requires employees to refrain from trying to change at-will status or if it requires employees to agree that they can never change at-will status
  - ▼ Safe harbor example: “Only the President may make an agreement other than for employment at will, and such an agreement must be in writing and signed by the President.”
  - ▼ NLRB continues to attack at-will clauses

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## Anti-Discrimination, Anti-Harassment, Anti-Retaliation

- ▼ Define Protected Statuses
  - ▼ Those required by law and those you choose
  - ▼ And “any other traits or classes protected under applicable law.”
- ▼ Define Discrimination
- ▼ Define Harassment
  - ▼ Sexual and other harassment
- ▼ Define Retaliation
- ▼ Reporting Procedure
  - ▼ Two routes
  - ▼ Train anyone who could be construed to hold a reporting role
- ▼ Investigation Procedure
  - ▼ No retaliation
  - ▼ Confidentiality to the extent practicable

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## Reasonable Accommodations

- ▼ In addition to non-discrimination, Employer will provide reasonable accommodations for individuals with physical or mental impairments, and on the basis of pregnancy, childbirth, or related medical conditions, at all stages of employment
- ▼ Permissible accommodations are those that do not constitute an undue hardship
- ▼ Direct employees to Human Resources to request an accommodation

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## Union-Free

- ▼ Describe direct, one-on-one philosophy
- ▼ Other policies where this theme can be emphasized:
  - ▼ Open-Door
  - ▼ Safety
  - ▼ Compensation

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## Attendance and Punctuality

- ▼ Progressive discipline approach (same or different tract as conduct?)
  - ▼ Catch-all for “excessive absences”
- ▼ Emphasize impact to other employees
- ▼ Include no-call, no-show
  - ▼ Don't let one extended absence without notice count as one occurrence
- ▼ Publish a reporting/call-in procedure
  - ▼ Protection against FMLA abuse

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## Leaves of Absence

### Usually Mandatory

- ▼ FMLA (for locations with more than 50 employees in 75 miles)
- ▼ Jury Duty (in most states)
- ▼ Voting Leave (in most states)
- ▼ USERRA-protected leave for military service

### Discretionary

- ▼ Administrative
- ▼ Bereavement
- ▼ Birthday

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## Compensation and FLSA Safe Harbor Policy

- ▼ Define the workweek and payday
- ▼ Organization's commitment to paying time correctly
- ▼ Will pay by direct deposit be required?
- ▼ How will nonexempt employees clock in or report their hours worked?
- ▼ No time card falsification or clocking in for others
- ▼ Are breaks regular enough to be included?
- ▼ Overtime
  - ▼ Unauthorized overtime may be punished by discipline, but not deduction in pay
  - ▼ FLSA Safe Harbor ("Review Your Paystub")

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## Benefits

- ▼ If employer goes into detail on benefits provided, it should include careful disclaimers that plan documents control

*The benefits summarized here are often reviewed and revised and may be changed from time to time. Plan documents from the benefit providers, or notices from the Employer, supersede the language in the summaries provided here. The Employer reserves the right to eliminate or modify any of its employee benefits at any time, with or without notice.*

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## Vacation and Sick Leave

- ▼ In the 1990s and early 2000s the trend was to move toward combined PTO policies to avoid HR transactions associated with what qualified for “sick leave”
- ▼ That trend has now reversed. The advent of federal paid sick leave mandates for federal contractors, the wide variation among states imposing their own paid sick leave requirements, has resulted in many employers reverting to a separate vacation and sick leave policies, which may be more practical particularly for employers with multistate footprints.
- ▼ In terms of cost, many states consider vacation/PTO a form of compensation for which accrued but unused balances must be paid out upon separation, but do not mandate carryovers or accruals. Paid Sick Leave mandates (federal and state) generally require carryovers and accruals but do not require pay outs upon separation. So the risk in trying to combine these obligations into PTO is that you could end up with enhanced liabilities on the balance sheet that have to be carried over/paid out.
- ▼ A word about so-called “Unlimited Vacation” or “Take What You Need” policies

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## Conduct

- ▼ Consider whether formal designations will be used based on severity of conduct
  - ▼ Whether taking an exhaustive or general approach to defining misconduct, include language indicating that management reserves the right to classify actions as misconduct
- ▼ Consider whether you will generally adhere to a progressive discipline policy
  - ▼ Even if a progressive disciplinary policy is articulated in handbook, handbook should specify that progressive discipline is not guaranteed, and that employer will use its discretion in selecting the appropriate discipline, up to and including dismissal

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## Drug and Alcohol-Free Workplace

- ▼ Consider whether you intend to follow your state's Drug-Free Workplace Act (or analogous federal law for federal contractors)
  - ▼ Usually a discount on workers' compensation premiums
  - ▼ Requires some testing and a more comprehensive policy
- ▼ What testing will the employer conduct?
  - ▼ Ex: post-offer/pre-employment, reasonable suspicion, post-accident, random
- ▼ Policy may condemn drug use, and alcohol use/impairment on the job, but should not indicate bias based on status as an addict
- ▼ Increasingly beware of state restrictions related to lawful "off duty conduct" or California's generalized prohibition on marijuana testing

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## Tobacco-Free Workplace

- ▼ Becoming a “smoke/vapor/tobacco free workplace ”
- ▼ Employers *may* ban tobacco use in their facilities and vehicles
- ▼ Smoke breaks—just like meal or other breaks—are not required, but beware FLSA compensation rules
- ▼ While employers may have a tobacco-free workplace, sponsoring tobacco cessation program is a wellness program that should be well documented in compliance with applicable federal law

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## Technology

- ▼ Recognize that computers, internet access, voicemail, smartphones, applications, thumb drives, servers, etc., are all sides of the same die
- ▼ Any use of any Employer-provided technology may be monitored, specifically or in the aggregate
  - ▼ In other words, employees “should have no expectation of privacy” with any Employer-provided smartphone accessing a personal Gmail account
- ▼ Make employees responsible for their own passwords and security; they should not log in for each other any more than employees should clock in for one another
- ▼ Reinforce protection for trade secrets and proprietary information
- ▼ Reinforce anti-discrimination, anti-harassment, anti-retaliation policies
- ▼ Consider gatekeepers or guardrails around appropriate/authorized AI software use

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## Social Media

- ▼ Thumb your nose at NLRB
- ▼ Use an educational approach
  - ▼ Advise them of limited and shifting privacy
  - ▼ Advise them to adopt a cooling off period before posting rants
- ▼ Consider a gatekeeper
- ▼ Instruct employees to refrain from guerrilla marketing
- ▼ Reinforce technology policies on personal use
- ▼ Reinforce protection for trade secrets and proprietary information
- ▼ Reinforce anti-discrimination, anti-harassment, anti-retaliation policies

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## Social Media

- ▼ Decide level of compliance with shifting NLRB guidance
- ▼ Disallowing use of Employer's logo or pictures
  - ▼ vs. "Only designated Officers may represent the Employer on social media...."
- ▼ Disallowing use of social media to disclose compensation or benefits
  - ▼ vs. disallowing use of social media to disclose proprietary or confidential information
- ▼ Disallowing criticism of supervisors and managers
  - ▼ vs. disallowing treatment, discussion, or bullying of employees, customers, competitors that would violate Employer policy

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## Security

- ▼ Workplace violence
  - ▼ Establish zero tolerance for threats and bullying as well as physical conduct
  - ▼ Require employees to report threats by anyone: co-worker, customer, domestic partner
- ▼ Weapons
  - ▼ Caution with “guns in the parking lot” laws
- ▼ Personal Property
  - ▼ Establish no expectation of privacy. Employer has right to remove locks, inspect bags and packages, etc.

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## Safety

- ▼ For single-location employers, consider mapping or describing fixed locations for
  - ▼ First aid kits
  - ▼ Automated External Defibrillators
  - ▼ Tornado/severe weather/active shooter shelters
- ▼ Encourage reporting safety risks and suggestions
- ▼ Retailers, banks, and others facing risks of thefts should include specific instruction for employees to respond to such situations



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## Other policies to consider

- ▼ Open door policy
  - ▼ Exception for reporting of discrimination, harassment, retaliation
- ▼ Dress code
  - ▼ Vest ultimate authority in manager
  - ▼ Avoid sex-based dress code (i.e. dresses for ladies, suits for men)
- ▼ Standards for phone and personal etiquette
- ▼ Termination/Resignation policy
  - ▼ Benefit for employees who provide notice
  - ▼ Exit interviews

# Maintaining A Handbook

- ▼ Use supplemental policies/handouts for a significant legal change (ex: creation of a new type of state leave of absence)
  - ▼ If Employer has an online handbook, this should be updated immediately
- ▼ Use individual contracts for confidentiality, trade secrets, intellectual property assignments, non-competition

# Maintaining A Handbook

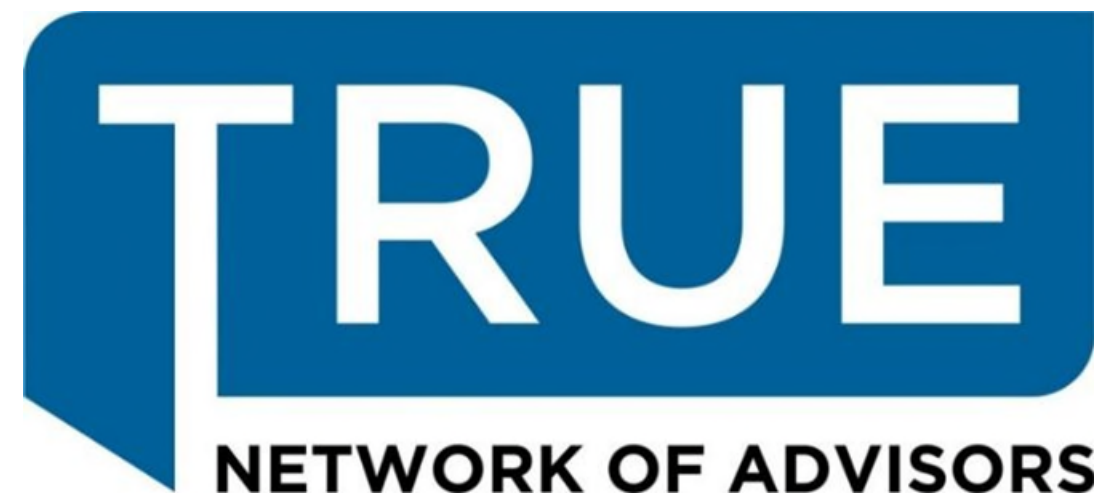
- ▼ Otherwise, an annual review is normally appropriate
  - ▼ By management/HR:
    - ▼ Does everything about the handbook — formatting, ordering, organization — reflect our priorities?
    - ▼ Are we actually complying with this policy?
    - ▼ Do we have the ability to enforce this policy?
    - ▼ Should the scope of this policy be narrowed?
    - ▼ Are there existing rules we want to emphasize?
    - ▼ Are there new rules or expectations we want to communicate?
    - ▼ Can our typical employee find answers to his/her basic employment questions here?

# Maintaining A Handbook

## ▼ Annual Review

### ▼ What I look for:

- ▼ Does this Handbook communicate?
- ▼ Do policies comply with the law?
- ▼ Is the Employer using “safe harbor” or “savings clause” language?
- ▼ Do policies match the Employer’s risk tolerance for the gray areas?
- ▼ Are there other policies or practices that should be discussed or implemented?
- ▼ Are the Employer’s policies in keeping with general best practices as viewed from the field of employment law?
- ▼ Can the Employer’s typical employee find answers to his/her basic employment questions here?



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