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EMPLOYMENT LAW DIGEST

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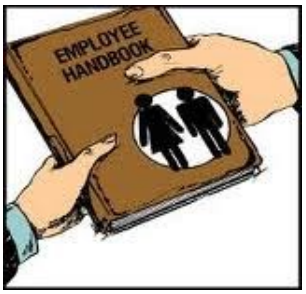
Have You Updated Your Employee Handbook Lately?



A carefully crafted and regularly updated handbook is a useful tool to inform employees of work rules, procedures, expectations and their eligibility for various benefits. It can also help protect against employee complaints and serve as an effective tool to minimize litigation and liability. However, a poorly drafted or outdated handbook can actually be detrimental in many ways, including misleading employees about their rights, responsibilities and benefits, and being used in court by aggrieved employees (or their lawyers) to support claims of unlawful treatment. In order to ensure that a handbook provides a helpful reference to important policies and does not expose the employer to liability, it is crucial to regularly review handbook policies – at least every couple of years – for compliance with any changes in federal, state or local laws, as well as any changes to actual employment practices. Of course, an updated handbook is only as good as its consistent application and enforcement. Therefore, regular training of managers responsible for implementing and enforcing the policies is also essential.

Here are some of the more common areas needing updates:

DISCRIMINATION POLICY? Anti-harassment and discrimination policies should list "genetic information" as a protected characteristic in order to reflect the Genetic Information Nondiscrimination Act's (GINA) prohibition of discrimination against applicants and employees on this basis. Please note that San Antonio has recently adopted an Ordinance prohibiting discrimination on the basis of sexual orientation. This ordinance prohibits, among other things, discrimination on the basis of sexual orientation or gender identity. The ordinance is limited in that it only applies to employers who have contracts and subcontracts with the City of San Antonio. This ordinance is brand new and is still being developed and it could change or be expanded through time. If this occurs, we will notify you through this Newsletter.

FMLA? The final FMLA regulations implementing the amendments to the FMLA made by the 2010 National Defense Authorization Act (NDAA) became effective on March 8, 2013. These amendments expanded the FMLA's qualified exigency and military

What's Inside?

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caregiver leave entitlements in several important ways. FMLA policies need to reflect these changes, which were clarified in the final regulations, including the following: (1) military exigency leave is available to employees with an immediate family member in *any branch* of the Armed Forces, not just the National Guard and Reserves; (2) military exigency leave is only available if the service member has been deployed to a *foreign country*; (3) military exigency leave may be taken to care (other than on a routine, regular or everyday basis) for a service member's parent who is incapable of self-care, including arranging for alternative care, and addressing admissions and transfers to appropriate care facilities; (4) the maximum amount of qualified exigency leave an employee may take to spend time with a service member undergoing short-term rest or recuperation is now 15 days instead of five days; (5) military caregiver leave may be taken to care for family members who are recent veterans, not just current military members; (6) the definition of a serious injury or illness includes not only those that were incurred in the line of duty, but also those that existed before active duty service and were aggravated in the line of duty; and (7) any health care provider, not just those affiliated with the Departments of Defense or Veteran Affairs, may provide required medical certification of a service member's serious illness or injury.

In addition to making revisions to comply with these statutory changes, employers should remove any statement that employees will be terminated if their absences exceed the maximum amount of leave permitted under the FMLA because the Americans with Disabilities Act (ADA) may require employers to provide a disabled employee with additional time off as a reasonable accommodation. At a minimum employers should make clear that they will engage in an interactive process with an employee who is unable to return to work within the stated deadline without just automatically terminating the employee.

CRIMINAL BACKGROUND CHECKS? The EEOC issued guidance on April 25, 2012, positing that an automatic disqualification of applicants for employment on the basis of criminal conviction history may violate Title VII because it could have a disparate impact on some minority groups. The EEOC recommended developing a written policy and procedure for conducting criminal record checks, which includes identifying the essential functions of a job and determining what specific offenses may demonstrate unfitness for those job functions. Therefore, handbook policies should avoid blanket statements that criminal convictions will disqualify applicants from employment or otherwise lead to adverse employment actions.

LACTATION BREAKS? The Fair Labor Standards Act (FLSA) was amended by the Patient Protection and Affordable Care Act of 2010 to require covered employers to provide reasonable break times for non-exempt employees who are nursing mothers to express breast milk for up to one year after a child's birth. The amendment also requires employers to provide a location for the employee, other than a bathroom, which is shielded from view and free from intrusion of coworkers and the public. The breaks are not required to be paid, but employers must allow employees to use any paid break time for this purpose.

Other common handbook review considerations:

Policies need to reflect current employment practices and procedures. Not only do policies have to reflect legal changes, they should reflect changes in the employer's actual employment practices. If policies are not consistent with actual practices, this can cause not only confusion for employees and managers; it can provide ammunition to employees claiming discriminatory or other unlawful treatment.

Avoid implied contract claims. The handbook introduction should explicitly state that it does not create an express or implied contract and that the company may modify the policies at any time. It is also crucial that the handbook contain disclaimers (in the introduction and throughout the handbook in relevant policies, such as a progressive discipline policy) specifying that employment is at-will and can be terminated at any time for any lawful reason.

Preserve employer discretion. Remove language that unnecessarily limits the employer's discretion by stating that the employer "will" or "shall" take certain employment actions, or will act within a certain number of days (unless required by law). Many handbooks outline a progressive discipline policy setting forth various levels of discipline (i.e., verbal warning, written warning and termination) for misconduct and inadequate work performance. Some companies choose to provide a list of infractions that may lead to discipline. In this case, the policy should state that it is not an "all inclusive" list. Companies need to also make sure the policy does not imply that an employee will not be terminated until he or she has gone through all of the other disciplinary action steps. The policy should clearly state that the company has discretion to determine when and what discipline is warranted, and may skip any disciplinary step based on the severity of the offense.

Regularly updating your employee handbook is crucial in order for it to serve its intended purpose of accurately informing employees of their rights, responsibilities and benefits. Failure to update can have the unintended consequence of the handbook causing more harm than good. Once handbook policies are updated, companies should ensure that every employee has received a copy (preferably via electronic distribution which is the most cost effective, expedient and easiest to track) and signed an acknowledgement that the employee has reviewed and understands the policies, which should then be placed in the employee's personnel file. Finally, supervisors and managers should be regularly trained about any policy changes in order to help ensure even-handed application and enforcement. ****

Some Good News for Texas Employers

Gloria Garcia, a 27-year employee at Mission Consolidated Independent School District, was 48 years old when she was terminated. She claimed her termination was age-based. It was a one-on-one replacement (in which the employee is replaced by someone else), and her replacement was 51, three years older than she was at the time.

In asking the trial court and the court of appeals to toss the age claim, the school district essentially argued, "Where's the age discrimination?" The courts refused to dismiss the claim. Why? In their view, even if Garcia was replaced by someone older, she still should have an opportunity to show she was discharged because of her age.

Our supreme court didn't agree and resorted to a purely mechanical approach, saying the only question was whether the replacement was older than Garcia. If so, game over, and she loses-no ifs, ands, or buts. *Mission Consolidated Independent School District v. Garcia.*

Obviously, this case deals a serious blow to those employees claiming age discrimination who were in fact replaced by someone who was older than them. However, in many cases, employees are not replaced by someone who is older than them or they are not replaced at all. In other cases, it is difficult to pinpoint a particular person who replaced the Plaintiff/employee.

In any event, it remains to be seen how devastating this case will really be to age discrimination litigants. On a related note is the fact that an argument could be made that if a person (for example) claiming race discrimination is replaced by someone of their same race or someone who is claiming religious discrimination is replaced by someone of their same religion – does the employer have the same argument to make as the employer did in the *Garcia* case? This may be a stretch; however, I do believe some employers will try this argument if they have in fact replaced an aggrieved employee with an individual of their same race, national origin, region, etc. ****

WARNING: NLRB and DOL Are Poised To Proceed With Pro-Labor Rules

Previous Newsletters have warned employers on the federal governments repeated attempts to impede and in some cases prohibit private employers from providing accurate and truthful information to their employees concerning the perils and pitfalls of joining a labor union. Well the government is back at it again and this time they may get away with it. In 2011, the National Labor Relations Board (NLRB) and the Department of Labor (DOL) simultaneously introduced proposed rules that would have a severe impact on employers: the NLRB "quickie" election rules and the DOL persuader activity reporting rule. Although the NLRB adopted the ambush election rules in 2012, they were immediately sidetracked in litigation and have not been in effect. Similarly, the DOL never issued a final rule on persuader activity reporting. Now, with a complete five-member NLRB and a new Secretary of Labor, these two agencies have made clear that these pro-labor rules are a priority for 2014.

NLRB "Quickie" or "Ambush" Election Rules

On November 26, 2013, the NLRB issued its semiannual regulatory agenda. It focused on the quickie election rules that were invalidated by a federal district court less than one month after issuance on the basis that they were adopted without a proper Board quorum. Those rules were suspended pending appeal of the case and the U.S. Supreme Court's consideration of *Noel Canning* (the case regarding the validity of President Obama's recess appointments of NLRB members in January 2012). However, on December 9, 2013, the NLRB voluntarily dismissed its appeal – removing the quickie election rules from the litigation track and repositioning it on the fast track toward agency adoption and implementation.

Among other things, the 2012 ambush election rules cut *in half* the time between a union's filing of a representation petition and an election – the crucial period for an employer to counter a union's organizing efforts – from a 42-45 day period *to a 10-21 day period*. They also limited the scope of pre-election hearings and provided the agency with the discretion to review post-elections decisions, rather than automatically requiring such review.

DOL Persuader Rule

On November 26, 2013, the DOL also issued its semiannual regulatory agenda. It indicated that the final persuader rule will be issued in March 2014. The proposed persuader rule interprets a part of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") that requires employers and their labor relations consultants to report any arrangement between them involving the consultants' attempt to directly or indirectly, persuade employees to exercise or not to exercise their rights to organize.

Historically, lawyers have been excluded from this reporting requirement provided that they limit their activity to providing the employer with advice or materials for use in persuading employees and avoid direct contact with the employees. That interpretation has allowed employers to seek labor advice without fear of potential disclosure of attorney-client privileged information (e.g., the very fact that the company has hired an attorney to assist with counter-organizing campaign). In contrast, the proposed rule would blanketly require attorneys and employers to report "all actions, conduct, or communications that have a direct or indirect object to persuade employees," including among other things:

- drafting, revising, or providing materials or communication of any sort to an employer for presentation, dissemination, or distribution to employees; and,
- developing employer personnel policies or practices designed to persuade employees.

This is significant because it could require an employer who seeks any advice on a labor issue to disclose the relationship, including fees paid and the purpose of the arrangement, to the DOL. Such sensitive information would be available to unions, customers, competitors, financial institutions, etc. Many critics believe that the rule will dissuade employers from seeking professional counsel regarding any labor union related matter – which will inevitably lead to gains for unions.

Bottom Line: It is clear that the NLRB and DOL are quickly moving towards severely limiting an employer's ability to counter union organizing efforts. If union avoidance is your company's goal – now is the time to contact your local congress person and demand that they take action to mitigate the detrimental effects these changes will have on managements' ability to fairly and completely inform their employees about labor unions. ****

Fry's Electronics Will Pay $2.3 Million To Settle EEOC Harassment, Retaliation Suit

SEATTLE-National retail chain Fry's Electronics agreed Aug. 30 to settle an Equal Employment Opportunity Commission suit charging sexual harassment and retaliation with a $2.3 million payment that the commission called among its highest settlements ever on a per claimant basis (EEOC v. Fry's Elecs. Inc., W.D. Wash., No. 2:10-cv-01562).

Under terms of a consent decree filed in the U.S. District Court for the Western District of Washington, the company agreed to pay $1.56 million in damages and attorneys' fees to a Renton, Wash., employee who was fired after protesting an assistant manager's harassment of a 20-year- old employee at the store and $760,000 to the employee who endured her boss's harassment.

The EEOC suit alleged that a Fry's assistant manager at the Renton store, Minasse Ibrahim, repeatedly sent America Rios text messages "on how good she looked, offering her alcohol even though Ms. Rios was under age 21, inviting her to his home, and making reference to wanting to play with Ms. Rios's breasts." When her direct supervisor, Ka Lam, protested the harassment, he was fired and filed a charge of illegal retaliation under Title VII of the 1964 Civil Rights Act with EEOC. During the investigation of the charge, the commission "discovered the related claim" of Rios.

Under terms of the consent decree, Fry's will provide Ka Lam $1.56 million in compensatory damages, attorneys' fees and lost wages. Rios will get $760,000. Fry's also will be enjoined from engaging in harassment based on sex and from retaliating against employees opposing such discrimination. The decree also mandates minimum standards for the company's anti-harassment policies and requires training on and distribution of those policies.

This case has two frightening aspects: first it is important to note that this case involved absolutely no touching by the Assistant Manager even though $2.3 million was exchanged between the parties. Also, Ms. Rios never filed an EEOC charge and yet she received $760,000.00! This case should be a reminder to all employers to take seriously any report, complaint or even potential problem involving sexual harassment or any type of harassment for that matter. It is important to err on the side of caution and always investigate thoroughly these types of claims and take appropriate action depending upon the circumstances. ****

The Lighter Side of Law

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If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.

E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.