

South Shore Chamber of Commerce

The Employee Handbook: Friend or Foe?

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Presented by

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The Employee Handbook

- Should you have one?
- Is it a contract?
- Should you require employees to sign for it?
- How should it be written?
- What should it contain and not contain?
- What kind of changes can you make once it is issued?

The Employee Handbook

Should you have an employee handbook?

- Considerations
 - Employee Relations Tool
 - Orientation information for the new employee
 - Communicate the ground rules
 - Establish expectations/responsibilities
 - Explain payment of wages/benefits
 - Provide legally required/encouraged notices

- Exhibit #1 in Litigation



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The Employee Handbook

Is it a Contract? (Jackson factors)

- Whether the employer retained the right to unilaterally modify the terms of the employee handbook;
- Whether the handbook stated that it was for “guidance” only;
- Whether the parties negotiated the terms of the handbook;

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The Employee Handbook

Is it a Contract? (Jackson factors) *cont.*

- Whether the employee signed the handbook or manifested his assent that he understood or agreed with its contents;
- Whether the handbook stated a term of employment;
- Whether the employer called special attention to the handbook.

The Employee Handbook

- Is it reasonable for an employee to view the handbook as containing enforceable promises?
 - Ferguson v. Host International, Inc., 53 Mass. App. Ct. 96 (2001)
 - Ortega v. Wakefield Thermal Solutions, Inc., 20 Mass. L. Rptr. 337 (Mass. Super. 2006)

The Employee Handbook

How should it be distributed?

- Do you need verification of receipt?
- Verification of reading and understanding?
- Should you require employees to sign acknowledgement?
- Print vs. electronic distribution?

The Employee Handbook

How should it be written?

- Clear and simple English
- Avoid small print, technical language, footnotes
- Use cross-referencing
- Repeat important points
- References to other documents; e.g., SPDs
- Consistent with employee orientation and training
- Repeated reminders about important provisions

The Employee Handbook

What should it contain or not contain?

- At Will Employment
- Introductory (probationary) period
- Handbook only a summary - not a contract
- Company policies prevail in the event of a conflict
- SPDs/Insurance policies/benefit plans prevail in the event of a conflict
- Require employees to keep personal information updated
- Right of amendment/right of interpretation
- Disclaimers – Ortega case

Employer's Failure to Comply with Handbook Policies

- Used to show unequal or unfair treatment
- Used to show “pretext”
- Used to support legal claims

Case Examples:

- Ligenza v. Genesis Health Ventures, 995 F. Supp. 226 (D.Mass. 1998)
- Beaird v. Seagate Tech., 145 F.3d 1159 (10th Cir. 1998)
- Rosales v. Career Sys. Dev. Corp., 2009 U.S. Dist. LEXIS 101808 (E.D. Cal., 2009)

Hypothetical

Kathy has had an ongoing performance problem. While Kathy is out on an approved FMLA leave, the manager finally becomes fed-up. He sees how much more smoothly the department runs with a strong performer in Kathy's position. When Kathy returns from her leave, the manager sits down with her and does her annual review. The review is very poor and identifies numerous deficiencies, not necessarily identified in prior reviews.

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Hypothetical

The Company has a progressive discipline policy that calls for a warning before termination. The Company policy on employee evaluations states that they will be used as a positive tool, and as an opportunity to show employees where there may be room for improvement. The conduct policy of the Company does not identify poor job performance as a serious conduct issue, as the Company considers conduct and performance to be two separate areas and issues.

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Hypothetical

Much to Kathy's surprise, along with her evaluation comes notice from her manager that her employment is being terminated. Her manager states that he would be happy to help with the transition by recommending severance, but that things would not work out any longer.

The temp who was filling in for Kathy while she was out is hired.

Wage and Hour: Policies to Help Manage Work Time

- Work Time
- Scheduling
- Overtime
- Breaks
- Unauthorized Work
- Work at Home

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Wage and Hour: Unintended/Intended Wage Agreements

- Vacation
- Sick
- Personal Time
- Incentive Bonuses
- Benefits

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Wage and Hour: Policies to Assist in Meeting Timekeeping Requirements

- Timekeeping Requirements
- Conduct Policies

Benefits

- Workers' Compensation
- Health Plans/Group Health Insurance
- Health Care Eligibility Notification under Mass Health Care Reform
- Welfare Plans
- Life Insurance
- Short and Long Term Disability
- Accidental Death and Dismemberment
- Tuition Reimbursement

Benefits

- COBRA Provisions
- HIPAA Notice of Privacy Practices
- Pension Plan/401(k)/403(b)/457
- Employee Assistance Programs
- Wellness Incentives

Benefits

- Handbook is not the place for detailed descriptions
- Interplay between SPD and employer policy- plan controls where there is a conflict
- Right to amend, modify or discontinue
- Right to interpret ambiguous provisions

Leaves of Absence

- Family and Medical Leave Act (FMLA) (TAB E)
- Massachusetts Maternity Leave Act (MMLA)
- Small Necessities Leave Act (SNLA)
- Workers Compensation
- Sick Leave
- Bereavement
- Other Leave (e.g., Personal Leave, Education Leave)
- USERRA
- National Guard/Military Reserve Service
- Jury Duty
- Relationship Among Leave Policies (e.g., to run concurrently where permissible)

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Anti-Discrimination/EEO

- EEO/Non-Discrimination
- Affirmative Action (if applicable)
- Sexual Harassment (TAB F)
- Other Forms of Harassment
- ADA/Handicap/Reasonable Accommodation
- Retaliation

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Miscellaneous Policies

- Drug and Alcohol
- No Smoking
- Workplace Violence
- Solicitation and Distribution
- Reporting Workplace Injuries
- Workplace Safety (e.g., universal precautions/BBP, lockout/tagout, MSDS/hazard communications)

Miscellaneous Policies

- Electronic Communications: Standards and Monitoring (E-Mail, Voicemail, Internet, Telephones, Computers)
- Social Networking
- Codes of Conduct/Ethics/Compliance (e.g., Sarbanes-Oxley)
- Confidentiality
- Employment References

Industry-Specific Requirements

- Federal Contractors
 - Affirmative Action Plan
 - Other Requirements (e.g., OFCCP)
- State Contractors (e.g., EOHHS/EOEA)
 - Affirmative Action Plan
 - Non-Discrimination in Employment and Service Delivery
 - Grievance/Dispute Resolution
- Health Care
 - JCAHO
- Banking
 - Regulatory and Insurance Requirements

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Performance and Discipline

- Performance Expectations/Work Rules
 - State that professional performance and productivity are expected
- Prohibited Conduct
 - Examples of Prohibited Conduct – Pros and Cons
 - Drug and Alcohol
 - Bullying
 - Criminal Conduct
 - Off Duty Conduct
- Evaluations/Performance Reviews/Wage Adjustments
 - Don't commit to regular wage increases

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Performance and Discipline

- Discipline
 - Degree of Specificity vs. Flexibility
 - Performance Improvement
 - Probation
 - Transfer
 - Suspension
 - Discharge
 - Return of Property
 - Progressive Discipline – Rule of “no surprises” (TAB D)

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Complaint/Dispute Resolution Process

- “Open Door” Policy
- Grievance Procedure/Conflict Resolution Procedure
- Arbitration?

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Questions?



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