

## Top 10 Employee Handbook Updates for 2016

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***Laws on leave, overtime and social media are changing fast. Are you keeping up?***

by Steve Bates 2/9/2016



With only four employees, the firm was so small that it didn't think it necessary to update its employee handbook after New York City enacted the Pregnant Workers Fairness Act in 2013. The statute requires reasonable employment accommodations for expectant workers.

Then, when one of its employees became pregnant, the employer determined that it could not operate short-handed during her absence. By relying on its handbook, which made no reference to the city law, management apparently concluded that it had the right to fire any employee at will, and the company terminated the pregnant woman.

It shouldn't come as a surprise that she filed a lawsuit—or that she won her case, says [Albert Rizzo](#), an employment attorney who practices in New York City.

This incident underscores the importance of regularly updating your company's handbook, as well as your organization's underlying policies and procedures. Not only are state, federal and local laws changing rapidly, so too is the technology shaping how people work today. It's now essential for HR to make handbook revisions, with the input of legal counsel, at least once a year.

"The handbook is a living organism that needs to be changed constantly," Rizzo says.

An employee handbook lays out how the employer wants employees to be treated and how workers are expected to behave. But it can do more: It can make a clear statement about an organization's brand and culture, and it can serve as a tool to attract, engage and retain top talent. "It's an introduction to who we are," says Julia Grafton, an HR generalist at Boston-based architecture firm [Shepley Bulfinch](#).

Handbooks need not include every detail of an employer's policies or every provision of the laws impacting the workplace. Rather, they should be worded carefully so that the HR department is not boxed in. For example, it's best to leave out the nitty-gritty of the company's severance policy and to avoid speculating on possible future changes to overtime pay rules in order to preserve flexibility. In addition, the handbook should include a disclaimer that it is not an employment contract; provisions affecting such disclaimers vary by state.

As we work through the early months of 2016, here are the top 10 areas where handbook updates may be needed:



### **Collective Bargaining**

In a series of cases in recent years, the [National Labor Relations Board \(NLRB\)](#) has made it clear that companies must protect their employees' free speech rights. These rights extend not only to watercooler conversations but also to discussions on social media about pay, working conditions and unpopular bosses.

#### **Tips for an Effective Handbook**

- Be concise. But don't be too legalistic in wording.
- Be original. Don't borrow language from other organizations.
- Be careful. Have legal counsel review it at least annually.

Many companies are concerned—rightfully so—about workers disclosing confidential business information, so they have created rules that attempt to restrict what employees can say to colleagues and people outside the organization. When these policies are overly broad, according to the NLRB, they violate collective bargaining rights—even when there has been no effort made to form a union. The agency has initiated enforcement actions against employers for this offense. Handbooks can prohibit employees from revealing confidential business information, such as data on vendors and customers, but the text should avoid any language that could be interpreted as infringing on speech and actions that the National Labor Relations Act (NLRA) protects.

"Employers need to engage in a delicate balancing act here," says Melinda Figeley, vice president of HR consulting services at [NFP](#) in Austin, Texas.

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### **Social Media and Data Privacy**

Many people today perform work-related tasks on personal smartphones and tablets. They conduct personal business and participate in social media on these devices as well. Handbooks must make it clear that employees have no right of privacy while accessing social media at work or on company-owned equipment. In one incident, a person was found to be using Facebook via a work laptop for almost two hours every day, Rizzo says. Because of a clear policy in the employee handbook, the organization was able to terminate the individual.

The proliferation of devices creates data protection issues for companies, too. Handbooks should state that workers cannot disclose proprietary information—with the exception of speech protected by the NLRA. Make sure employees are clearly instructed not to download apps onto a device that contains employer information and not to click on links in unsolicited e-mails. Your handbook also should warn workers not to leave a device used for work in a car and should require them to report a lost or stolen company-provided phone or tablet immediately. Finally, it should state that, when a person leaves the organization, his or her devices can be wiped clean of the employer's data.

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### **Reasonable Accommodations**

Employees are entitled to reasonable accommodations under certain circumstances, such as for physical and mental health conditions; for religious beliefs, practices and observances; and for pregnancy, childbirth and related medical issues. (Several states and localities have enacted laws protecting pregnant workers as well.) But not all workers who might want an accommodation—or who qualify for one—make a clear statement requesting one.

Employers should spell out in their handbooks not only the legal bases for accommodations but also the company's intention to comply with them when reasonable. Managers must be put on notice that, if a worker mentions a condition that might qualify, they should ask if the employee is seeking an accommodation.

"Your handbook should be clear about when, in what circumstances and to whom requests for accommodations should be made," says Joshua A. Druckerman, an employment attorney with New York City-based [White Harris](#).



## **Retaliation**

Many handbooks say the organization will not tolerate retaliation, which in recent years has been the most common charge brought by the [U.S. Equal Employment Opportunity Commission \(EEOC\)](#). But not all such passages state that they protect witnesses and others who participate in an investigation of a retaliation claim. “This is often a major gap in EEO [equal employment opportunity] policies,” says Jonathan A. Segal, a partner at the law firm [Duane Morris](#) in Philadelphia.

In addition, the handbook should state that the employer cannot promise confidentiality for people who make retaliation complaints. Instead, it can say that their identities will be revealed only on a need-to-know basis. The process must be fair for both the person making the retaliation claim and the individual who is being accused.

Jason Carney, HR director at Indianapolis-based [WorkSmart Systems](#), a professional employer organization, says that numerous for-profit companies include a whistle-blower protection provision to underscore their commitment to treating employees justly.

A retaliation claim may also accompany a discrimination charge, Segal notes. An expensive judgment or settlement can follow. For example, a man complained to his HR department that he was being subjected to age bias and, within a week, he was fired, according to a suit filed on the worker’s behalf by the EEOC. In 2013, a federal judge in Colorado awarded him \$675,000 in the case, which alleged discrimination and retaliation by his former employer, RadioShack.



## **Wages and Payroll**

Two pay-related issues—unauthorized overtime and improper deductions from workers’ pay—frequently trip up employers and should be addressed in writing to minimize legal liability. With respect to the first issue, employers are watching to see what happens with the proposed changes to the federal overtime regulations, although it is too early to know what handbook revisions will be necessary as a result.

It’s not uncommon for people to work more hours in a pay period than planned. Federal law makes it clear that, if employees qualify for overtime, they must be paid for the additional work they do outside their normal hours. However, companies should state in their handbooks that employees may not work overtime without advance permission from their manager and that managers can discipline employees after they work unapproved overtime. It also should be made clear that nonexempt employees should

not access job-related e-mails or conduct other business outside of work hours, which can trigger pay issues.

If an organization makes an improper deduction from a worker's pay, it can correct the mistake, including through the payment of overtime wages if warranted. If it corrects the mistake, the employer might qualify for a [U.S. Department of Labor \(DOL\)](#) safe harbor provision shielding it from government penalties. The handbook should spell out practices that the company engages in—and does not engage in—with regard to pay, noting that it will make good-faith efforts to correct mistakes when alerted to them.

When the DOL offers a safe harbor, Segal says, “grab it.”



## State-Specific Laws

States have passed several significant employment laws in recent years, and municipalities are joining the trend. Every employer is responsible for staying abreast of changes to laws and regulations that impact its worksites, and then adjusting policies and practices accordingly. Employee handbooks cannot be amended every time a new law or rule takes effect, of course, but at least once a year they should be updated to reflect the most recent and important changes.

For example, as of July 2015, California law requires employers to provide workers with paid sick leave; according to the [National Conference of State Legislatures](#), Connecticut, Massachusetts and Oregon have similar measures. California, New Jersey and Rhode Island mandate paid family leave. Some states require time off for emergency responders or disaster workers. And a new California law is designed to close the wage gap between men and women by requiring companies to justify differences in pay between the sexes for the same work.



## Leave Benefits

While a handful of states and localities continue to push the envelope regarding paid and unpaid leave, some companies have decided that offering additional leave is just good business.

Several big corporations, largely in the tech sector, have unveiled generous parental leave policies within the past year. Among them are Facebook, Netflix, Amazon, Microsoft and Johnson & Johnson. Other benefits now being offered by some employers include pay during domestic-violence-related leave; jury duty leave; and blood, organ or tissue donation leave.

## Options for Multistate Employers

- A single handbook. Include all state and local variations in topical sections.
- Multiple versions. Tailor each handbook version to each company location.
- A back-end approach. Deal with state-specific issues in addenda.

Such provisions can promote workers' well-being and boost employee morale, as well as enhance the image and brand of the organization.

If an organization offers leave benefits beyond those required by law, it should make a declarative statement about this in its handbook. "It sets forth the company philosophy: 'We don't just comply with what the law says,'" says Gordon Berger, a partner with the [Ford & Harrison](#) law firm in Atlanta. "And it eliminates ambiguity."



### Attendance

Employers must be careful how they treat a worker who is not eligible for leave under the federal Family and Medical Leave Act (FMLA) or who has exhausted such leave. He or she might still be eligible for leave under the Americans with Disabilities Act (ADA). Your handbook should note that a person might qualify for leave under the ADA as a reasonable accommodation.

"In many cases, the ADA trumps the FMLA when an employee's own medical condition requires an accommodation, regardless of whether the accommodation is needed on the employee's first day of employment or once they are covered under the FMLA," Carney says. "Failure to update employee handbooks to outline the accommodation procedures and provisions for how things like benefit premium payments are handled while an employee may be on a personal leave of absence can result in headaches for any company with 15 or more employees."

Employers are urged to perform a thorough individual assessment of each person who takes federally protected leave, and that practice should be emphasized in writing. Make it clear that workers will not be punished for legitimate absences from work.



### Smoking and Marijuana Use

Gone are the days when HR had to worry only about hammering out clear rules regarding cigarette smoking at work. Today, the use of e-cigarettes and new laws legalizing medical or recreational marijuana necessitate more-complex and more-nuanced policies.

Handbooks that do not mention e-cigarettes specifically should be revised to do so, treating them like any other tobacco product. The text should set forth restrictions on where tobacco can be used, such as not inside the building and at least 30 feet from an external door, and should clearly state that e-cigarettes and other tobacco products are covered under the smoking policy.

Generally, marijuana used for recreational and medical purposes can be treated like other drugs. In addition to barring consumption at work, employers in most—but not all—states can dictate that employees not be under the influence of alcohol, illegal drugs and even legal drugs that impair them significantly while on the job.

State laws on marijuana are in flux, however, and court interpretations of them are sparse. Arizona, Delaware and Minnesota prohibit organizations from firing an employee for a positive marijuana test if the person holds a valid medical marijuana registration card. Some states limit adverse actions against workers for a positive drug test if there is no evidence of work-related impairment. In 2014, a Michigan court approved unemployment compensation benefits for a medical marijuana user. Yet marijuana possession remains a federal crime.



A seminal 2015 [U.S. Supreme Court](#) decision held that states must permit and recognize same-sex marriages. As a result, companies must provide to same-sex married couples the same health and retirement benefits that they offer to other wedded individuals. There may be some flexibility with health insurance requirements if the employer is self-insured, but the risk of discrimination claims remains.

Laws and regulations are still evolving regarding employment rights of those in the lesbian, gay, bisexual and transgender (LGBT) community. More than 20 states and many municipalities recently expanded their anti-discrimination protections to include transgender individuals. Moreover, the EEOC has asserted that gender identity is included within Title VII of the Civil Rights Act of 1964. And in 2015, an eye clinic in Lakeland, Fla., agreed to pay \$150,000 to resolve a federal lawsuit alleging sex discrimination against a transgender individual who was fired.

Given the controversy and emotion that these issues generate, some employers use their handbooks to express their intention to treat all employees equally and fairly regardless of their marital status, sexual orientation or sexual identity. Such a statement can be added to an existing provision declaring that the

organization does not discriminate unlawfully on the basis of race, religion, color, national origin, age, disability, political affiliation and the like. It's worth the effort to be sensitive in these areas.

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