

Top 10 Employee Handbook Updates for 2012

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The New Year is a great time for employers to review and update their employee handbooks. It is especially important this year because of several changes to existing laws, as well as new challenges that employers may not have previously addressed in their handbooks, such as workplace bullying.

Below is a list of the top 10 areas that employers should consider updating in their employee handbooks for 2012:

1. **Equal employment opportunity policies.** It is important that employers have clear equal employment opportunity (EEO) policies and consistently enforce such policies. In June 2011, the U.S. Supreme Court reversed certification of a class of approximately 1.5 million Wal-Mart female employees claiming that Wal-Mart engaged in sex discrimination by denying female employees promotions and raises. In *Dukes v. Wal-Mart*, the Supreme Court specifically noted that Wal-Mart had an EEO policy that it enforced, including imposing penalties on those who violated the policy. In light of the *Dukes* decision, employers should be sure to update and enforce their EEO policies, which may prove critical in avoiding and defending litigation.
2. **Employee discipline.** A disciplinary policy with clear procedures places employees on notice of the possible consequences of violating the employer's policies. Disciplinary policies should require supervisors to look

into and document every disciplinary action consistently. This evidence will help employers defeat challenges from employees who have experienced adverse employment decisions. A clear policy that provides for uniformity and consistency in disciplinary actions will reduce the risk of exposure to discrimination claims.

3. **Workplace violence and conflict resolution.** In September 2011, the Occupational Safety and Health Administration (OSHA) issued a directive on how to respond to workplace violence, which remains a top concern for employers. Workplace violence currently affects nearly 2 million people every year, and is not expected to abate as layoffs and unemployment continue. Workplace violence-related litigation includes actions for negligent hiring, worker's compensation and violations of OSHA. Though handbook policies cannot always prevent workplace violence, they serve an important purpose by providing employees with avenues for reporting incidents and obtaining counseling, and give guidelines for responding when violence is suspected or threatened.
4. **Workplace bullying.** Workplace bullying involves repeated unreasonable acts toward an employee, either by a peer or supervisor, intended to humiliate or undermine the employee, creating a risk to his or her health. Workplace bullying is not yet illegal, but employers have significant incentives to prevent it. The costs of bullying to an employer include training new employees to replace employees who leave as a result of bullying; decreased productivity as employees cope with bullying incidents; and harm to an employer's reputation. Employers should seriously consider revising their employee handbooks to reflect a zero-tolerance anti-bullying policy as part of their commitment to a safe and healthy work environment. Such policies should include a process for reporting bullying, as well as responding to and investigating complaints of bullying.
5. **New National Labor Relations Board rules.** While Congress did not pass the Employee Free Choice Act (EFCA), employers should be prepared for changes in union-organizing tactics and procedural requirements, and should make sure handbooks are up to date on union issues. Agencies, including the National Labor Relations Board (NLRB), have been attempting to adopt, through rulemaking, many of the reforms sought in the failed EFCA legislation. The NLRB proposed various rules in 2011 that support unionization, including rules that would lead to significantly speedier union elections. Another requires all employers to post a notification by January 31, 2012, informing employees of their rights under the National Labor Relations Act (NLRA). While the final rule associated with the notice posting requirement is being legally challenged, employers must stay informed of this issue to ensure compliance.
6. **Social networking and blogging.** As Facebook, LinkedIn and Twitter accounts become more prevalent, employers should consider handbook policies that address employment issues that may arise from these social media. Such policies should address what communications are prohibited

and the consequences of misuse of social networking related to the workplace. Employers should place limits on posting confidential or proprietary company information, as well as photos taken at the workplace. In addition, handbook policies should address the use of social media to disparage or harass other employees, or the company. However, employers must be aware of the NLRB's recent ruling, which established that the NLRA gives employees the right to communicate about wages, hours and other conditions with one another via social media. Specifically, in May 2011, the NLRB ruled that an employer violated the NLRA when it fired an employee for publicly discussing "protected concerted activity" via Facebook.

7. **More Family and Medical Leave Act changes.** The U.S. Department of Labor (DOL) Wage and Hour Division recently issued Administrator's Interpretation No. 2010-3, clarifying a provision of the Family and Medical Leave Act (FMLA), declaring that either day-to-day care or financial support may establish an *in loco parentis* relationship. According to the DOL, an employee who does not have a biological or legal relationship with the child, but assumes the responsibilities of a parent with regard to the child, may qualify for FMLA leave under the same circumstances as a biological parent. The interpretation also recognizes nontraditional family arrangements, including adopted children of same-sex partners, and states that an employee who will share equally in the raising of a child with the child's biological parent also is entitled to leave for the child's birth.
8. **Sexual orientation discrimination.** Nearly half the states and the District of Columbia have laws that prohibit discrimination in employment on the basis of sexual orientation. Some of these states also specifically prohibit discrimination based on gender identity. As a result, employers should be mindful of this issue in revising their EEO policies.
9. **Benefits provisions.** Many employers have made changes to their benefits plans in 2011 and should be sure their handbooks accurately reflect those changes. Furthermore, the handbooks should state that the language in the benefit plan controls if the handbook summary and the plan language differ.
10. **Adverse weather/other closings.** More companies are incorporating adverse weather policies into their handbooks to provide guidance on when the business will close, and how weather-related absences or shutdowns will affect employee compensation. Employers need look no further than Hurricane Irene in 2011 for an example of a natural disaster that forced businesses to close, some for many days, if not weeks. Policies should address such considerations as shutting down the workplace, working remotely, cross training and returning to work, as well as compensation issues for both exempt and non-exempt employees. Employers must ensure such policies are in compliance with the federal Worker Adjustment and Retraining Notification (WARN) Act, if applicable, and other similar state laws, which require notice to employees in the event of a plant closing.

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Employers should seek counsel before revising their handbooks. There is no one-size-fits-all employee handbook or policy. The laws with which employers must comply vary greatly depending on individualized factors, such as an employer's size and location. In addition, when employers adopt new policies, they should make sure their employees are aware of the changes, obtain signed acknowledgement forms from their employees and implement the new policies consistently.

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