Top 10 Employment Handbook Mistakes:

Effective Strategies for Avoiding Lawsuits before They Happen and Increasing the Likelihood of Winning When They Do©

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Neither Texas law, nor federal law, requires employers to adopt or maintain a written employment handbook. But a well-drafted employment handbook is the keystone to sound business practices. From a non-legal perspective, employment handbooks enhance the employer-employee relationship, promote a sense of fairness, set an organizational tone, and nurture an organization's institutional culture. By providing employees important information on a broad range of subjects, handbooks also free managers from answering mundane employment-related questions so they may address more pressing concerns.

From a legal perspective, a well-drafted employment handbook is able to minimize an employer's exposure to employment-related lawsuits and increase an employer's likelihood of prevailing when litigation cannot be avoided. Clearly written policies also may enable an employer to escape liability against certain employment-related claims and, if liability is a certainty, decrease the likelihood of a sizable punitive damages award. On the other hand, a poorly-drafted or outdated employment handbook and selectively-enforced policies are an invitation for lawsuits and, worse, a litigation roadmap leading to significant employer liability.

Not only should employers maintain an employment handbook, but the handbook should be tailored to an employer's workforce, specific to the states where the employer operates, and reviewed at least annually by an employment law specialist.

In my practice, I have drafted countless employment handbooks and policies for employers ranging from small family-run businesses to Fortune 500 employers. I estimate that I have litigated cases involving even more. Below, I have assembled what I believe to be the top 10 employment handbook mistakes and proposed strategies and policies for Texas employers who seriously aim to avoid lawsuits before they happen and increase the likelihood of prevailing when they do. While the strategies and recommendations are not ranked in order of priority, they collectively comprise the minimum safeguards that Texas employers should consider when drafting and revising an employment handbook.

1. Not Having an Employment Handbook

According to a recent national study, the average cost to settle an employment-related lawsuit is $300,000.00. The average jury verdict is higher. Consequently, an employment handbook that eliminates even one lawsuit provides an amazing return on investment. It is surprising then that some employers still do not have one.

Employers who operate without one may operate under the assumption that their organization is too small to need an employment handbook. This is a dangerous

assumption. Although some small employers may be immune from liability for sexual harassment, disability discrimination, gender discrimination, religious discrimination, or age discrimination depending on their number of employees, they remain susceptible to various employment-related claims, including: national origin discrimination and race discrimination claims under 42 U.S.C. §1981; unpaid overtime claims under the Fair Labor Standards Act; and military leave reemployment and discrimination claims under the Uniformed Services Employment and Reemployment Rights Act. In addition, employers are susceptible to non statutory state law claims such as breach of contract for unpaid wages, commissions, or bonuses, defamation, tortious interference, and misrepresentation. Significantly, these theories of recovery are not dependent on an organization's number of employees.

Moreover, smaller and mid-sized companies may be more susceptible to employment law-related liability. These organizations often require management-level employees to wear many "hats"—including some with which they are unfamiliar—such as administering the Human Resources function. The chances for violating federal or state employment law increases when managers are stretched too thin or an organization does not employ a dedicated manager to oversee the Human Resources function. For these reasons and more, all employers—at a minimum—should adopt an employment handbook as a measure against employment-related liability.

2. Employment At-Will Disclaimer

In Texas, unless the parties agree otherwise, an employer may terminate an employment relationship "at-will." This means that, absent some contractual obligation or illegal reason, an employer may discharge an employee at any time, with or without notice, with or without cause, and for any or no reason.

Statements in an employment handbook or other employment literature may modify the at-will relationship if the statements specifically and expressly curtail the employer's right to terminate an employee.

To modify the at-will nature of an employment relationship, an employee must prove that the employer and he entered into an agreement that directly limits the employer's right to discharge the employee in a "meaningful and special way." To be effective, the employer "must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances."

While courts recognize that general comments that an employee will not be discharged as long as his work is satisfactory or without "good cause" when there is no agreement on what those terms encompass, employees nonetheless mistakenly believe that a manager's occasional "attaboy" or other encouragements alter the at-will nature of the employment relationship.

To reduce the chances that oral assurances or statements contained in employment literature are construed as a modification of an employee's "at-will" status, all

employment handbooks should contain a statement reaffirming the at-will nature of the employment relationship. Further, this statement should include language explaining that no manager or other company representative may alter the at-will nature of the employment relationship unless the modification is in writing and signed by the employee and the president (or other senior company officer). Employers should consider adding this disclaimer and proviso to employment offers, performance improvement plans, work manuals, codes of conduct, and other written literature.

3. Signed Acknowledgement of Receipt and Understanding

Employment handbooks confer few benefits if employees do not read and understand them. They confer even fewer benefits if an employer cannot *demonstrate* that an employee received and understood the handbook.

Every handbook should contain a "Receipt and Acknowledgement" page to be signed and dated by each employee, acknowledging: (1) the employee's receipt of the handbook; (2) the employee has read/understands the handbook and agrees to abide by all of the employer's employment policies and practices; (3) the employee understands that his employment is "at-will"; and (4) the handbook is not a contract and the employer retains the right to modify, amend, supplement, or withdraw the handbook, in its sole discretion, at any time.

Once signed, this "Receipt and Acknowledgement" should be kept in the employee's personnel file. An employer should obtain employees' signatures on a new "Receipt and Acknowledgement" page every time it revises or supplements its handbook.

4. Anti-Harassment Policy

Employers with 15 or more employees are prohibited from illegally harassing employees. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, the U.S. Supreme Court concluded that an employer is strictly liable for sexual harassment by a supervisor which results in a tangible employment action, such as a demotion or discharge. *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). If no tangible employment action occurs, however, an employer may escape liability depending on, among other things, whether the employer maintains and effectively implements an anti-harassment policy.

The *Ellerth/Faragher* affirmative defense requires employers to prove two elements: (1) the employer exercised reasonable care to prevent and promptly correct sexually harassing conduct; and (2) the employee unreasonably failed to utilize the employer's established preventative and corrective procedures.

To avail itself of this affirmative defense, an employer should establish a policy that defines and prohibits unlawful harassment, instructs employees who believe they are harassment victims to report their concerns, and prohibits retaliation against persons who

report bona-fide concerns about harassment or who participate in the investigation of harassment complaints.

In harassment lawsuits, fact finders routinely consider: whether the employer adopted and implemented a specific policy prohibiting workplace harassment; whether the employer disseminated the policy to employees; whether and when the employer learned of the alleged harassment; and, if the employer had knowledge, whether the employer responded in a reasonable manner. If an employee later files a harassment lawsuit without first utilizing the employer's complaint procedure, the employee's failure to complain may form the basis of the employer's defense. There is limited, but growing, authority, that even if an employee promptly utilizes an employer's complaint procedure, an employer still may escape liability.

An employer's anti-harassment policy should provide employees with more than one reporting option because employees are unlikely to report harassment if the person designated as the company's harassment officer is the alleged perpetrator. The policy should identify the company's harassment liaison as a member of management by title and, as an alternative, an equally or more senior member of management identified by title. Both persons designated should be trained in how to handle harassment complaints and the proper procedure to immediately commence an investigation. Because "notice" of an employee's harassment complaint may be imputed to the employer even if the complaint is not communicated to one of the company's harassment liaisons, an employer's duty to exercise due care should include instructing all supervisors and managers to address and report harassment complaints to an appropriate company official regardless of whether they are officially designated to accept complaints and regardless of whether the complaint is framed in a manner which conforms with the company's complaint procedure.

Often, an issue in supervisor harassment litigation is whether the alleged harassment victim promptly reported the offending conduct. To defeat an employee's contention that he did not promptly report his complaint because he never received the anti-harassment policy and did not know about his reporting duties, employers are strongly encouraged to require employees to sign and date an anti-harassment acknowledgement, memorializing the employee's receipt of the anti-harassment policy and agreement to report harassment in the manner described.

5. Equal Employment Opportunity

The U.S. Supreme Court's *Ellerth* and *Faragher* decisions were sexual harassment cases under Title VII of the Civil Rights Act of 1964. Courts, however, have construed these decisions broadly and have begun to extend the affirmative defense to employers in other types of cases under Title VII, the Age Discrimination in Employment Act, and Americans with Disabilities Act.

In light of this expansion and the benefits of a policy combating unlawful employment practices, it is increasingly important that employers diligently create and enforce

procedures for reporting and correcting unlawful discrimination, retaliation, and harassment, whether the conduct is based on an employee's sex, race, religion, age, or other protected class status.

A written equal employment opportunity policy not only may be required depending on an employer's status (e.g. federal contractors), but is an opportunity for an organization to acknowledge that it will not tolerate unlawful employment practices and that employees who report or participate in investigations of prohibited conduct will not suffer retaliation.

The effectiveness of an employer's anti-discrimination/harassment policy and its enforcement may be a key factor in a jury's punitive damages determination. *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

Further, it is customary for the U.S. Equal Employment Opportunity Commission to request a copy of an employer's EEO policy in connection with its investigation of employee discrimination complaints.

6. Improper Paycheck Deductions Policy

The U.S. Department of Labor's ("DOL") August 2004 overtime regulations adopted an *Ellerth/Faragher*-esque "safe harbor" for employers who violate the Fair Labor Standards Act by making improper deductions from the pay of salaried exempt employees.

Under the old regulations, an employer who had a practice of making improper deductions not only risked losing the exemption for the affected employee, but it could have lost the exemption for all employees in the affected employee's job classification who worked for the manager who was responsible for the improper deduction—a potentially disastrous situation.

Under the current regulations, an employer who (1) has a clearly communicated policy against improper deductions, including a complaint mechanism, (2) who reimburses employees for mistaken deductions and (3) who makes a good faith commitment to comply in the future, will not lose the exemption for any employees, unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

According to the DOL, the best evidence of a clearly communicated policy is one that is written and distributed to employees before the improper pay deductions occur. DOL encourages employers to provide a copy of the policy to employees when they are hired, publish it in an employee handbook, and distribute the policy to employees over the employer's Intranet.

Under the "safe harbor" provision, an employer's paycheck deduction policy should state that the policy's purpose is to prohibit and prevent improper deductions from

salaried exempt employees' pay, identify the proper grounds for making deductions as specified in the revised regulations, state the company will reimburse employees for improper deductions, and include a specific complaint procedure for reporting improper deductions.

Like an employer's anti-harassment policy, its improper paycheck deduction policy should provide employees with more than one reporting option. Moreover, employers should require employees to sign and date an improper deduction policy acknowledgement, memorializing the employee's receipt of the policy and agreement to report improper deductions in the manner described.

7. Disciplinary Action and Termination

Termination policies often include language describing inappropriate workplace conduct that may result in discipline or termination and, perhaps, some sort of progressive disciplinary procedure that may afford employees several levels of notice and an opportunity to correct work problems before termination.

Drafted properly, these policies guide employees' behavior and expectations, and are a boon to employers contesting Texas Workforce Commission unemployment insurance claims. Frequently, however, these policies become the subject of employment-related litigation when employers deviate from the proscribed disciplinary procedure or discharge employees for offenses not enumerated in an employer's policy.

The appearance of fairness and equal treatment is the core concept that should guide employer's termination and progressive discipline policies. To reduce the likelihood that a discharge decision or deviation from the policy will appear unfair—or, worse, discriminatory—an employer's termination and progressive discipline policy should include: (1) a comprehensive list of prohibited activity; (2) an affirmative statement that the list is not exhaustive and other conduct that is not listed, but which is unacceptable, disruptive, or inconsistent with the organization's business objectives, also may be grounds for disciplinary action or termination; and (3) a declaration that the company retains the unfettered right to deviate from the stated procedure, and even discipline and/or discharge an employee without resorting to the steps set forth in the policy, depending on the facts and circumstances. Employers should be sure to avoid any language which may be construed to mean that employees may only be terminated for "cause" or the prohibited conduct listed in the policy.

These recommendations work in conjunction with a handbook's employment at-will disclaimer to increase an employer's chances of obtaining a summary dismissal of a former employee's wrongful termination lawsuit or prevail on an employee's Texas Workforce Commission unemployment claim.

8. Commissions, Bonuses, and Vacation Pay

Aside from discrimination, harassment and retaliation, no area of employment law appears to be subject to more dispute than the effect a termination has on an employee's entitlement to unused vacation, personal days, commissions, bonuses, and other benefits.

The Texas Wage Payment Act, TEX. LAB. CODE ANN. §61.001, *et seq*., addresses the rights of employees to receive wages earned. "Wages" means compensation owed by an employer for: (i) labor or services rendered, whether computed on a time, task, piece, commission, or other basis; and (ii) vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under an employer's written policy.

(a) Vacation Pay and Other Leave

Texas employers are not required by law to provide employees with holiday, vacation, or personal leave on either a paid or unpaid basis. If an employer possesses no such policy, the Texas Workforce Commission typically will deny an employee's post-termination claim for unused vacation pay and the like.

An employer, however, may unwittingly obligate itself to pay such benefits if the company pays these benefits under limited circumstances or to some departing employees but not others. The Texas Workforce Commission may consider an employer's past practices of selectively paying these benefits on past occasions to determine if an employee is entitled to them upon termination. Therefore, employers should adopt a written policy.

At a minimum, a company's written policy should specify two main things: (1) whether employees accrue vacation or other leave time based on their duration of service; and (2) whether accrued but unused leave time is forfeited upon separation from employment. If leave is not forfeited automatically, the policy should specify any requirements for the payment of accrued, unused leave. For example, some employers limit payment of accrued, unused leave to employees who are not terminated and provide at least two weeks notice of their resignation.

(b) Commissions and Bonuses

Commissions and bonuses also are governed by the Texas Wage Payment Act. Texas law requires that commissions and bonuses be paid in a timely manner and according to the terms of the agreement between the employer and employee. *See* TEX. LAB. CODE ANN. §61.015.

Like vacation and other leave policies, commission and bonus arrangements are susceptible to disputes concerning the effect of termination and when an employee's right to a commission or bonus accrues or becomes earned. Only the stakes generally are far greater.

Commonly, employers include some form of an "active employment" requirement that results in employees forfeiting commissions if the employment relationship terminates before payment.

The Texas Supreme Court has not addressed whether a written "active employment" requirement is enforceable. Some Texas courts have strictly enforced "active employment"-type provisions in favor of employers. For example, in *White v. Aguirre*, a bonus case, the Dallas Court of Appeals affirmed summary judgment in favor of the employer. 2002 WL 987930 (Tex.App.--Dallas, May 15, 2002, no pet. h). In that case, the court strictly enforced the terms of the employer's bonus provision, which provided that only persons employed on the date of payment were eligible for a bonus. *Id*.; *see also Schaeffer v. Dunham*, 501 S.W.2d 416 (Tex.Civ.App.--Corpus Christi, 1973, no writ).

On the other hand, some courts interpreting Texas law distinguish whether the employee's right to payment accrued before termination. *See Jourdan v. Schenker Int'l Inc*., 71 Fed.Appx. 303 (5th Cir. 2003). In *Jourdan*, the employer agreed to pay commissions if the employee continued to be employed at the end of the calendar year and for each quarter thereafter for which a payment was due. The employer discharged the employee—an at-will employee—before year end. The court vacated the trial court's judgment in favor of the employer because, even though the commission plan required "active employment" for payment and the employee was at-will, the plan was silent on when the employee's *right* to the commission accrued before payment. The court noted that, if the right to commissions accrued before discharge, the employee retained an interest in the commissions. On the other hand, if the right accrued at the time of payment, the employee's claim was lost.

Based on these two divergent views, employers who wish to pay incentive compensation only to active employees should incorporate these terms into written commission or bonus agreements as well as a general commission policy in their employment handbook. A sound incentive compensation program should include, among other things, language which defines: (1) when an employee's right to commissions "accrues"; (2) when such monies become payable; and (3) any conditions or other limitations on an employee's right to receive payment.

Employers who do not use written commission/bonus agreements, but have such a policy in their employment handbook should be careful to include the relevant "active employment" language in a separate signed acknowledgement to ensure the requirement is contractually enforceable.

Employers who do not use written agreements or an express bonus policy risk undesirable and unanticipated consequences. Under Texas law, an at-will employee who is discharged without good cause prior to the time specified for payment of a bonus is entitled to recover a pro rata part of the bonus for the period the employee actually worked. *Miller v. Riata Cadillac Co*., 517 S.W.2d 773 (Tex. 1975).

9. Employee Monitoring and Searches

An employee's right to privacy depends on his or her reasonable expectation of privacy. Often, privacy expectations are at odds with an employer's interests in protecting confidential information and intellectual property, increasing efficiency and productivity, and promoting workplace safety through monitoring company electronic and non-electronic communication systems, as well as physical searches of company property.

Employer monitoring programs often cover employees' use of telephones, facsimile machines, voicemail, the Internet, and e-mail. With the increasing popularity of other forms of communications, such as Instant Messaging (IM), no doubt this list will not remain static.

The Texas Supreme Court has not addressed whether an employee has an invasion of privacy claim against an employer who monitors company e-mails or these other forms of communication. In a victory for employers, however, in *McClaren v. Microsoft Corp*., the Dallas Court of Appeals concluded that, under the circumstances presented, an employee had no reasonable expectation of privacy in e-mail messages saved in personal folders on a company network. 1999 WL 339015 (Tex.App--Dallas 1999, no pet. h).

In the *Microsoft* case, the employee alleged an invasion of privacy claim against his employer which accessed personal folders on a network that allowed storage of e-mail messages after the company began investigating sexual harassment allegations against the employee. Access was obtained through a network password as well as a personal password created by the employee and allowed by Microsoft.

The Court distinguished the Microsoft employee's privacy expectation with an employee's expectation of privacy when an employer provides a locker to employees but allows employees to buy and use their own lock. *Id*.; *see K-Mart v. Trotti*, 677 S.W.2d 632 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The court observed that an employee with a locker and her own lock possessed a reasonable expectation of privacy because the locker is provided to the employee for the specific purpose of storing personal belongings. In contrast, Microsoft provided the employee his computer and the e-mail application for the purpose of his employment. Additionally, unlike a locked locker, e-mail messages stored in an employee's personal folders were first transmitted over the network and were at some point accessible by a third-party.

Under these circumstances, the Court could not conclude that the employee, even by creating a personal password, manifested—and Microsoft recognized—a reasonable expectation of privacy in the contents of the e-mail messages such that Microsoft was precluded from reviewing the messages.

Employers are strongly encouraged to adopt employee-monitoring policies as a means to destroy employees' expectations of privacy and avoid *Microsoft*-type invasion of privacy lawsuits. An employee monitoring policy should clearly set forth in writing an employer's intent to reserve the right to monitor telephone calls, voicemails, fax

transmissions, e-mails, Internet use, and Instant Messaging. The policy also should reserve an employer's right to conduct audio and video surveillance and physical searches on company property, including parking areas, break rooms, lockers, desks, and briefcases, purses and other luggage or bags on company property. As an additional measure, the policy should clearly state that the company's computers, networks, servers, telephones, fax machines, e-mail, and Internet are the exclusive property of the company, are intended solely for business purposes, and the company reserves the right to monitor employees' use of these devices and mediums.

10. "This Handbook does not constitute a contract…"

Under Texas law, an employment handbook generally does not constitute a binding contract for the benefits or other entitlements it describes, unless the handbook uses language clearly indicating intent to be contractual.

Employment handbooks should contain affirmative language that a handbook is not a contract and is subject to change at the employer's discretion. As noted, employers are encouraged to include this language in the separate acknowledgement that employees are required to sign when they receive the handbook. This "not a contract" language serves two important purposes: First, it may effectively negate an employee's subsequent effort in litigation to bind the employer to a stated policy—such as to strictly abide by its progressive discipline policy (especially if the policy does not expressly allow the employer to deviate from the stated procedure). Second, and equally important, the language affords an organization the flexibility to adjust its policies to ever-changing business circumstances.

Significantly, employers should understand that this "not a contract" language is a "double-edged" sword. In addition to reducing the chances that an employee may enforce handbook terms against the company, it also may prevent an employer from contractually enforcing handbook policies against employees. For this reason, employers who maintain a mandatory arbitration policy or other policies that they may wish to enforce against employees are cautioned against including these policies in their handbook.

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Attorney Biography

Described by one of Dallas's premier law firms as a "real go-getter who is tenacious and effective," Dallas employment lawyer Barry Hersh is the managing shareholder of Hersh Law Firm, P.C. and represents executives, professionals and businesses faced with the challenges of today's most pressing workplace issues: wrongful termination, harassment, overtime pay compliance and violations, non-competes, independent contractor classification; and complex employment litigation. He also reviews and negotiates executive severance agreements and employment contracts.

Barry received his undergraduate degree, with *high distinction*, from the University of Michigan, where he was a member of the Phi Beta Kappa Honor Society. He graduated from The University of Texas School of Law with *honors*. He also served as a judicial intern for Texas Supreme Court Justice, Nathan Hecht.

Before opening the Hersh Law Firm in 2004, Barry represented employers as an attorney with Haynes and Boone, L.L.P. and Jenkens & Gilchrist, P.C. Barry's industry experience includes representing individuals and businesses in the fields of emerging technology, manufacturing, auto sales, law, professional services, contract labor, commercial real estate, restaurant/food service, facilities management, financial services, mining and casinos, newspaper and television, property management, telecommunications, and transportation.

Barry is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. He is a past co-chair of the Speakers Committee for the Employment Law Section of the Dallas Bar Association and a former contributing editor of the American Bar Association's seminal wage and hour law treatise, *Fair Labor Standards Act*. Barry was voted by his peers as one of the "Best Lawyers Under 40" in *D Magazine* in 2006, and was selected as a 2005 and 2009 Texas Super Lawyer Rising Star by *Texas Monthly* and *Law & Politics Magazine.*

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