

## **An Arrow In the Employer's Quiver**

By Michele Goldsmith

Your potential new hire looks at you sincerely with inquisitive eyes and asks, "When will I be able to see the employee handbook?" Rather than responding with, "We don't have an employee handbook because we've been too busy to prepare one," the correct answer is: "You will receive the employee handbook in your hiring interview."

Why do employers, no matter how small, need an employee handbook? Because it is one of the most powerful tools at your disposal. The employee handbook communicates general workplace information to your employees, explains company policies, and establishes the rights and responsibilities of employees and management. Unions have had memoranda of understanding and collective bargaining agreements for decades. Public employers have administrative manuals and administrative codes. Private employers should be no different. Although employers are not required by law to have an employee handbook, the following 10 reasons demonstrate why an employer should:

*Uniformity of Policies:* Every day, employees ask questions about management, inquiring about policies such as overtime accrual, floating holidays and paid leave. Unless there is a uniform policy, the company may find itself providing different answers to different employees. A handbook can easily explain an employer's policies, whether they concern leaves of absence or intra-company dating, and will help reduce the administrative burden on the company's staff support. Another significant benefit are disputes between employees as to what a given "policy," which can be offset by use of a handbook.

*At-Will Employment Status:* California presumes that employment is "at-will," meaning that either employer or employee can end the relationship, with or without cause, at any time and for any reason. However, the at-will presumption can be shattered if the employee is able to rebut it and establish an "implied in fact" contract. Although not completely determinative, an employer who reemphasizes the at-will presumption in an employee handbook reaffirms the relationship, which can only help should the issue ever arise.

*Legal Compliance:* An employee handbook sets forth the basic tenets of employment law and their accompanying regulations, and concomitantly demonstrates an employer's dedication to them. In the last couple of years alone, changes to employer-paid COBRA benefits, military leave benefits, and paid family leave laws have been significant. Employers should keep abreast of these ever changing laws and digest them into comprehensible policy format for their employees. As new laws are enacted or existing ones modified, policy bulletins

should be generated and incorporated into the handbook's yearly revisions.

*Employment Arbitration Agreements:* A costly endeavor for all parties involved is a litigation involving an employment-related dispute. To avoid litigation, the parties may agree, in writing, that they will arbitrate any employment-related disputes. While a signed arbitration agreement is arguably a better means to protect this right, some employees may refuse to sign one. Additionally, if an employee signs the agreement, they may later argue that they were coerced. Accordingly, employers may wish to add a mandatory arbitration policy to their employee handbook. However, arbitration agreements are tricky. To be valid, the agreement must not unreasonably limit the employee's rights, an employee must understand that they're agreeing to arbitration, and the agreement must not be slanted in the employer's favor. A viable arbitration agreement can save the employer the hassle and expense of going through protracted litigation over an employment dispute.

*Benefits:* Employers spend large amounts of money on employee benefits, including insurance coverage, health care plans, leaves of absence, and vacation accrual. These are benefits that employees might not understand or expect. A comprehensive employee handbook defines when and how vacation can be used, if and how leaves are paid, and what will occur if an employee needs to take a leave of absence for extended medical care. These explanations can go a long way toward educating employees as to their rights and responsibilities in connection with the company's benefit plans.

*Work Expectations:* Employers may have expectations with regard to employee work performance, but as the saying often goes, "expectations lead to regret." An employee handbook that sets forth employees performance goals and expectations, working hours, and similar standards will only bolster an employer's business plan. Moreover, setting solid incentive plans, such as a merit bonus structure, further encourages employee productivity and performance.

*Legal Defense:* The California Government Code's Fair Employment & Housing Act, and the California Labor Code both require that employers adhere to certain specific rules and regulations regarding employment. A company's compliance with these laws can be more easily met by having an employee handbook. For instance, although the Supreme Court's long awaited and upcoming decision in *Brinker Restaurant Corp. v. Superior Court* may resolve whether an employer has to "ensure" the 30-minute meal period break (or whether it's enough to simply "provide" them), an employer's policy specifying the employee's obligations in this regard can go a long way to disprove a claim. Also, provisions regarding an employer's policies and practices to combat discrimination, harassment and retaliation, as well as conducting a complete and thorough investigation if a report of unlawful discrimination is made, are viable defenses in any subsequent employment litigation.

*Management Assistance:* If management does not understand what a policy is,

the policy might as well not exist. A company, once an employee handbook is in place, can more easily train its managers on the substance and implementation of its rules and policies. An employee handbook also acts as a useful reference when a manager needs to quickly answer a subordinate's question. Finally, as with any new employee, a new manager can use the employee handbook to quickly learn the company's policies and guidelines.

*Reduce the Risk of Employment Litigation:* If management is familiar with the provisions of an employee handbook, and otherwise complying with California law - i.e., completing interactive training for sexual harassment prevention every two years for two hours (or for a new supervisor within six months of hire) - a company reduces the risk that its management will make decisions contrary to its policies and/or the law. As California employers are strictly liable for the harassment of their supervisors, any actions that an employer can take to minimize the risk of litigation arising in the first place should be utilized. Moreover, if an employee handbook specifies prohibited conduct, and states that a violation may include, but is not limited to, termination, employees will have a harder time disputing their termination after the fact.

*Looking Forward:* As was demonstrated in the recent U.S. Supreme Court decision of *City of Ontario v. Quon* 2010 DJDAR 9072 (June 17, 2010), the advent and proliferation of technology in the workplace creates new and additional issues regarding employee rights to privacy and acceptable uses. If an employee handbook specifically clarifies the expectations of privacy an employee enjoys with regard to the use of electronics, an employer will not have to justify its monitoring practices, if any, after the fact. It is also important to note that although not uniformly required, some insurance carriers are now asking companies to maintain employee handbooks as a prerequisite for obtaining malpractice insurance.

Once a company makes the decision to create an employee handbook, it is good practice to consult a lawyer regarding its proposed provisions to ensure their legality and enforceability. Once the new handbook is complete, it should be distributed to all personnel who should be required to sign an acknowledgement that they have read, received and understood its contents. Lastly, an employee handbook is only as good as the employer who is willing to enforce its provisions. Rules that are not enforced can only lead to negative consequences.

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