

Hot Topics: Employee Handbook Edition

Presented by:

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Common Handbook Provisions

- ▶ Disclaimers*
- ▶ Acknowledgment*
- ▶ Leave
- ▶ Employee Benefits
- ▶ Dress Code
- ▶ Electronic Devices*
- ▶ Social Media*
- ▶ Attendance
- ▶ Weapons*
- ▶ Remote Workers
- ▶ Drugs/smoking
- ▶ Breaks
- ▶ Business Hours/Holidays
- ▶ Employee classification
- ▶ Harassment/bullying
- ▶ Timekeeping
- ▶ Discipline
- ▶ Standards of Conduct
- ▶ Fraternalization/nepotism
- ▶ Confidentiality

The Basics

- ▶ Disclaimers
 - ▶ Handbook is not a contract of employment
 - ▶ Protect “at-will” employment relationship
 - ▶ Handbook is subject to change at any time, without notice
 - ▶ Statement that any revised handbook supersedes and replaces all prior versions
 - ▶ Handbook is a guide and not exhaustive
- ▶ Acknowledgment of receipt
 - ▶ Written confirmation that employee has received, read and understood the handbook
 - ▶ Include amendment statement
 - ▶ Keep in employee’s personnel file
 - ▶ What if the employee refuses to sign?

Guns in the Workplace

- ▶ TN law generally allows employers to prohibit employees from possessing firearms on employer property
- ▶ The exception: employees with lawful handgun carry permits may store their firearms in their personal vehicles while parked on an employer's property
 - ▶ “Guns in Trunks Law”
 - ▶ An employee with a valid handgun carry permit can store firearms in his/her vehicle so long as the vehicle is parked in a permitted parking area and the firearm is secured out of sight and locked within the trunk, glovebox or interior of the vehicle
 - ▶ Employers not liable for damages, injury or death resulting from an employee's exercise of this right unless the employer commits an offense involving the stored firearm or intentionally solicits or procures the conduct giving rise to the liability
 - ▶ Employer not liable for theft of a firearm
 - ▶ Employee not in violation if the firearm is observed or detected while the employee is securing the firearm
 - ▶ Employers can require proof of valid handgun carry permit

Guns in the Workplace Cont'd

- ▶ Required notification that guns are prohibited
 - ▶ March 23, 2016, legislation changed how employers must notify people that firearms are generally prohibited
 - ▶ Employer must post appropriate notices in “prominent locations,” including all entrances to the building
 - ▶ Notice must contain:
 - ▶ The phrase “No Firearms Allowed,” which is at least 1 inch high and 8 inches wide
 - ▶ The words “As authorized by TCA § 39-17-1359,” in any size so long as it is “plainly visible”
 - ▶ A picture of a firearm inside a circle with a slash symbol over the firearm, at least 4 inches high and 4 inches wide with the diagonal slash at a 45 degree angle from the lower right to the upper left of the circle



Other Weapons in the Workplace

- ▶ The “Guns in Trunks Law” applies to firearms only
- ▶ An employer may prohibit other weapons on premises, including in parking lots
- ▶ Consider listing prohibited weapons with a catch all provision
 - ▶ “or other weapons that might be considered dangerous or that could cause harm”
- ▶ Consider statement that employer reserves the right to search company-owned or leased vehicles and all vehicles, packages, containers, briefcases, purses, lockers, desks, and persons entering its property, for the purpose of determining whether any weapon is being, or has been, brought onto its property or premises in violation of the policy

NLRB Memo

- ▶ The NLRB is an independent federal agency created to enforce the National Labor Relations Act (NLRA)
- ▶ The NLRA applies to most private sector employers but does not apply to federal, state, or local governments
 - ▶ Main concern is the “chilling” of an employee’s right to concerted activity to improve terms & conditions of work
- ▶ March 18, 2015, NLRB Office of General Counsel drafted a memo providing specific examples of lawful and unlawful employee handbook rules

NLRB Memo Cont'd

- ▶ Confidentiality: employees have a right to discuss wages, hours, and other terms and conditions of employment with fellow employees and with nonemployees
 - ▶ Unlawful: prohibiting employees from discussing wages, hours, or other terms and conditions of employment (e.g., breaks, morale, vacation, environment, etc.) or disclosing details about the employer
 - ▶ Lawful: prohibiting unauthorized disclosure of “business secrets” or other confidential information

NLRB Memo Cont'd

- ▶ Employee Conduct: employees have a right to criticize or protest their employer's labor policies or treatment of employees and the right to argue and debate with each other regarding the terms and conditions of employment
 - ▶ Unlawful: requiring that employees be respectful to the company, other employees, customers and competitors
 - ▶ Unlawful: prohibition on making insulting, embarrassing, hurtful or abusive comments about other employees
 - ▶ Lawful: prohibiting insubordination, threats, or assault against a manager/supervisor, coworker or customer
- ▶ Leaving Work: one of the most fundamental rights employees have under the NLRA is the right to strike
 - ▶ Unlawful: prohibition of "walking off the job"
 - ▶ Lawful: prohibition on entering or leaving company property without permission

NLRB Memo Cont'd

- ▶ Memo also discussed a 2014 unfair labor practices charge against Wendy's involving its employee handbook
- ▶ Examples of unlawful provisions:
 - ▶ “No part of this handbook may be reproduced or transmitted in any form or by any means . . . without express permission by Wendy's.”
 - ▶ “Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media . . .”
 - ▶ “Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a professional environment.”
 - ▶ Prohibition on “threatening, intimidating, foul or inappropriate language.”
 - ▶ “Your employee PIN and other personal information should be kept confidential.”
 - ▶ Prohibition of making “false accusations against the Company and/or against another employee or customer.”

Electronic Devices: Use and Abuse

- ▶ Electronic devices generally lead to increased efficiency and communication in the workplace
- ▶ Concerns: confidentiality, harassment, productivity
- ▶ Electronic devices may be employee or employer owned
- ▶ Important points to communicate:
 - ▶ Importance of password protection, security software & reporting of lost/stolen devices
 - ▶ No expectation of privacy
 - ▶ Appropriate use
 - ▶ Time
 - ▶ Content

Electronic Devices: FLSA Considerations

- ▶ One of the modern-era pitfalls under the Fair Labor Standards Act of 1938 (FLSA) is that employees are entitled to be paid for all hours worked, and nonexempt employees may use electronic devices to, for example, check work e-mails away from the office and during nonscheduled hours
- ▶ According to various surveys:
 - ▶ 18% of Americans report working from home everyday
 - ▶ 25% of employees check email on sick days and up to 61% check email on vacation
 - ▶ 66% of people read email 7 days a week and expect to receive a reply the same day
- ▶ DOL has announced that it is developing specific guidance on the use of technology, including portable electronic devices, by employees away from work and outside of scheduled work hours

Electronic Devices: FLSA Considerations Cont'd

- ▶ Provisions to consider for non-exempt employees:
 - ▶ Prohibition on making phone calls or checking, reading, sending or responding to work-related e-mails outside of normal work schedules unless specifically authorized based on job duties or direction by management to do so
 - ▶ Requirement that non-exempt employees track and report all hours worked, including time spent on cell phones, email, the internet, etc. for business purposes
- ▶ Alternatives
 - ▶ Consider limiting access to the company email server for non-exempt employees
 - ▶ Implement policy that managers refrain from calling/emailing non-exempt employees after hours

Electronic Devices: Social Media

- ▶ According to various surveys on the topic:
 - ▶ Americans spend an average of 116 minutes per day on social media
 - ▶ 60% of that time is facilitated by a mobile device
 - ▶ 30% of workers believe that being allowed to use social media at work greatly increases their job satisfaction
 - ▶ 60% of employees admit to using social media at work
 - ▶ 34% of those employees stated they use social media at work to “take a mental break”
- ▶ Don't forget about the NLRA
- ▶ TN Whistleblower Statute
- ▶ Monitor social media activity of employees

Electronic Devices: Social Media Cont'd

- ▶ Consider including the following provisions:
 - ▶ Ask employees to disclose that the employee's views are the employee's alone and that they do not necessarily reflect the views of the employer
 - ▶ Prohibit employee from representing that he/she is a spokesperson for the employer
 - ▶ Prohibit use of work-related discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct
 - ▶ Prohibit posting of knowingly false information about the employer, co-workers, customers/clients, competitors, etc.
 - ▶ Maintain the confidentiality of trade secrets and private or confidential information
 - ▶ Prohibit use of social media at work or on employer equipment, unless it is work-related and specifically authorized
 - ▶ Prohibit use of work email addresses to register on social networks, blogs or other personal uses

What is a Millennial?

- ▶ Anyone born between 1980-1995
- ▶ Why do we talk about them so much?
 - ▶ They currently make up more than 36% of the U.S. workforce and by 2025, they will account for 75% of the global workplace.
- ▶ Other characteristics
 - ▶ 64% would rather make \$40,000 a year at a job they love than \$100,000 at a job they think is boring
 - ▶ 74% want flexible work schedules (work-life balance is key)
 - ▶ Average 3.1 hours a day on mobile devices
 - ▶ 65% say losing their phone or computer would have a greater negative impact on their daily routine than losing their car
 - ▶ Connected to an average of 16 co-workers on social media
 - ▶ 56% won't work at a company if they ban social media access
 - ▶ 69% believe attendance is unnecessary on a regular basis

Handbooks & Millennials

- ▶ Your handbook can act as an avenue to attract millennials
 - ▶ Form
 - ▶ Content
- ▶ Electronic Device Provisions
 - ▶ Traditional: check your cellphone at the door
 - ▶ Millennial: use your best judgement on cell phone use during work hours
- ▶ Attendance Provisions
 - ▶ Traditional: you must be in the office, Monday through Friday, from 9:00-5:00
 - ▶ Millennial: you may work in the office or remotely

Additional Information on the Firm

Kennerly Montgomery is a general practice law firm that has provided legal advice to clients for 100 years. KM attorneys practice in a variety of areas, representing private employers, non-profits, and municipal clients, including local governments, agencies and public utilities.

Bill Mason, Kathy Aslinger, and Ashley Trotto practice extensively in employment and employee benefits law, which includes advising employers on individual employee issues, employment contracts, employee handbooks, as well as design, documentation, administration, audit, litigation, termination and qualification of employee health and welfare and pension plans for public, tax-exempt and private employers. They represent clients before various agencies regulating employment issues and employee benefits.

A Little About Your Presenters

Bill Mason received his law degree from Harvard Law School in 1974, and has been practicing more than 40 years, most of that time in employment and employee benefits for employers. He worked for the Tennessee Valley Authority from 1974 – 1986, Wagner Myers & Sanger PC, from 1986 – 1988, and William E. Mason PC from 1988 – 2009. Bill joined Kennerly Montgomery in 2009. He serves on the Board of Directors for the Legacy Park Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors. In 2016, the US Treasury Department appointed him as the IRS Taxpayer Advocacy Panel (TAP) representative for Tennessee.

As a leader of Kennerly Montgomery's employee benefits practice, Kathy Aslinger focuses on advising fiduciaries for the benefit of participants, assisting both private and governmental clients in the design, implementation and maintenance of their employee benefit plans, including 401(k), pension, cafeteria, and health plans. She commonly assists clients in maneuvering through the complex world of audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, as well as Affordable Care Act compliance. Kathy has been practicing law for over 17 years and has been with Kennerly Montgomery since January 2010. In addition, Kathy serves on the Board of Directors for Uplands Village, a continuing care retirement community in Pleasant Hill, Tennessee.

Ashley Trotto joined Kennerly Montgomery as a law clerk in 2012 and as an associate attorney in the Firm's employment law and employee benefits practice in 2013. Ashley concentrates on the Affordable Care Act and has been a frequent speaker on Affordable Care Act issues. Ashley serves on the Board of Directors for the Smoky Mountain Animal Care Foundation, a 501(c)(3) Non-profit organization established to introduce and promote programs to improve animal welfare in Blount County, Tennessee and the surrounding areas of the Great Smoky Mountains. She is also a member of the East Tennessee Benefits and Compensation Association, serves on the Hunger and Poverty Relief Committee of the Knoxville Bar Association and is a member of the United Way Health and Basic Needs Investment Committee. She's also the energy behind the Firm's on-going kindergarten book project at Christenberry Elementary.

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