

TOWING & RECOVERY MANAGEMENT SUMMIT 2023 SAN DIEGO, CALIFORNIA

Employee Handbooks What Every Employer Needs to Know

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- Why have an employee handbook?

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- Over One Hundred Thousand employment related cases are filed each year.
- Lawsuits Have Risen 400% in Just 20 Years
- 41.5% of Lawsuits are Against Small Businesses
- EEOC has Reported Over 1.8 Million Complaints Have Been Filed Since 1997

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- Lawsuit Resolution can Take Years
- Average jury awards have increased
- Billions of Dollars are Exchanged Each Year From Employers to Employees in Terms of Litigation/Verdicts and Settlements

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- 61% of Employees in the USA have Experienced or Witnessed Workplace Discrimination
- 45% of American Workers Have Experienced Age Discrimination
- 42% of Workers say They Have Experienced Sex or Race Discrimination in the Workplace

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- Why is This Happening?
- What can we do About This?

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Employee handbooks can be one of the most effective ways to communicate with employees. Effective communication is one of the ways to avoid employment related claims; however, handbooks can also be used as a basis for an employment related claim. Generally, these claims are based in contract law that the handbook creates a contract of employment eliminating the employment at will relationship.

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POLICY ENFORCEMENT

Enforcement can be difficult, but it is absolutely necessary.

Policies lose their importance if you don't enforce them.

Proper enforcement requires:

1. Investigation
2. Disciplinary action if necessary
3. Documenting information ASAP, while it's still fresh

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Employment At Will

- Generally, employers or employees are free to terminate the employment relationship at any time for any lawful reason without advance notice.

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Exceptions

Varies From State to State

Generally Comes in 3 Varieties:

1. Public Policy
2. Covenant of Good Faith and Fair Dealing
3. Implied Contract

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Exceptions (cont.)

Many Statutory exceptions to employment at will:

Federal statutes

1. Title VII of the civil Rights Act of 1964 and its Amendments: Employees are protected from discrimination in employment based on race, color, national origin, religion, sexual orientation, gender identity and sex, this includes protection from

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Exceptions (cont.)

discrimination based on pregnancy. The Act also protects employees from retaliation for exercising rights under the Act which include "opposing" alleged discriminatory practice.

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Exceptions (cont.)

2. Age Discrimination in Employment Act (ADEA): Employees are protected from discrimination based on age.
3. Americans with Disabilities Act (ADA): Comprehensive disability discrimination statute prohibits disability discrimination in private as well as public employment.

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Exceptions (cont.)

4. National Labor Relations Act (NLRA): Union activity by employees is protected.
5. Fair Labor Standards Act (FLSA): Employee rights are protected concerning payment of minimum wage and overtime compensation. This Act includes protection from retaliatory discharge for filing a complaint. The Equal Pay Act of 1963 was an amendment to the FLSA which makes

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Exceptions (cont.)

it illegal to pay different wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

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Exceptions (cont.)

6. Occupational Safety & Health Administration (OSHA) and other related Acts: Employee rights regarding the safety of the work place are protected. The Act contains retaliatory discharge provisions which protect employees from being discharged for complaining of OSHA violations.

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Exceptions (cont.)

7. Employee Polygraph Protection Act: Effective December 27, 1998, the Employee Polygraph Protection act bans the use of lie detector tests, including polygraphs, in most private employment settings.

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Exceptions (cont.)

8. Judicial Procedure Act: Employees performing petit or grand jury service cannot be terminated.
9. Family Medical Leave Act (FMLA): Employers may not interfere with an employee's exercise of rights under the act and may not discharge or discriminate against anyone for instituting proceedings or giving information or testimony relating to rights under the act.

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Exceptions (cont.)

10. Immigration Reform and Control Act (IRCA): The Act stated that it is an unfair immigration/related employment practice for a person or other entity to discriminate against any individual, other than an unauthorized alien because of that individual's national origin or citizenship status. Included within this prohibition is any discriminatory action taken because the individual intends to file or has filed a charge or complaint; because the

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Exceptions (cont.)

individual that testified, assisted or participated in an investigation, proceeding or hearing; or because the person wants to interfere with any right or privilege established by the unfair immigration related employment practices provisions.

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Exceptions (cont.)

11. Bankruptcy Code: Section 1525(b) of the Bankruptcy Code bars employment termination or discrimination by a private employer against a debtor or former debtor solely because such debtor: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent before the commencement of a case under the Bankruptcy Code; or (3) has failed to pay a dischargeable or discharged debt.

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Exceptions (cont.)

12. Uniformed Services Employment and Re-employment Rights Act (USERRA): Any person who seeks or holds a position in the employ of a State, or Political subdivision thereof, or a private employer shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the armed forces.

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Exceptions (cont.)

13. Consolidated Omnibus Budget Reconciliation Act (COBRA): The Consolidated Omnibus Budget Reconciliation Act (COBRA) contains provisions giving certain former employees, retirees, spouses and dependent children the right to temporary continuation of health coverage at group rates. The law generally covers group health plans maintained by employers with 20 or more employees in the prior year.

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Exceptions (cont.)

Many State statutes:

1. Texas Commission on Human Rights Act: Employees are protected from discrimination based on race, color, religion, national origin, age, gender, including pregnancy, or disability. The Act also protects an employee from retaliation by the employer for filing a discrimination charge.

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Exceptions (cont.)

2. **Worker's Compensation Claimants:** Texas law prohibits an employer from discharging or otherwise discriminating against an employee because the employee has initiated action to recover worker's compensation benefits, hired an attorney or instituted a proceeding. The Act also protects those employees testifying in these proceedings.

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Exceptions (cont.)

3. **Union Membership:** Protection for non-membership in a union (Right to work law).
4. **Juror Reemployment Act:** Protection from termination for jury service.

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Exceptions (cont.)

5. **Restriction on Penalizing Employee for Compliance with Subpoena:** An employer may not discharge, discipline, or penalize in any manner an employee because that employee complies with a valid subpoena to appear in a criminal, civil, legislative or administrative proceeding.

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Important Handbook Policies

1. **Equal Employment Opportunity Statement** (race, color, age, religion, age, national origin, disability, gender including pregnancy, sexual orientation and gender identity)
2. **Duration of Employment Statement**
3. **Sexual Harassment Statement**
4. **General Harassment Statement**

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Important Handbook Policies (cont.)

5. COBRA Statement
6. Alcohol and Drug Testing Notification; Searches
7. Leave of Absence
8. Required Standards for Regular Employment (Training/Evaluation Period)
9. Benefits including vacation and holiday pay

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Important Handbook Policies (cont.)

10. Payroll Periods, Time Keeping
11. No Solicitation
12. Employee Acknowledgment Statement
13. Safety Rules
14. Disciplinary Rules

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Important Handbook Policies (cont.)

- 15. Family and Medical Leave Statements
- 16. Violence/Weapons/Bullying
- 17. Internet Use/Emails
- 18. Attendance
- 19. Overtime

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Important Handbook Policies (cont.)

- 20. Vacation and Holidays
- 21. Dress Code and Personal Appearance
- 22. Relationships Between Employees
- 23. Grievance/Open Door

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Important Handbook Policies (cont.)

- 24. Lactation Breaks
- 25. Camera Phones/Recording Devices
- 26. Social Media
- 27. Infectious Disease/Remote Working

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POLICY ACKNOWLEDGEMENT

All employees should sign off on the handbook.

If policies are updated, employees should sign an updated acknowledgement form.

E-signatures are generally acceptable.

- **Make sure the signature is password protected, and only the employee has that information.**

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DISTRIBUTING YOUR HANDBOOK

- ▶ **Have a standard practice to distribute the policy handbook to new hires.**
- ▶ **Give employees sufficient time to read it.**
- ▶ **Make sure all employees understand the handbook and give them time to ask questions.**
 - ▶ **Note: If English is not employee's primary language, accommodate.**
- ▶ **Make sure the handbook is accessible to all employees**
 - ▶ **Make handbook available online, or a keep an easily accessible copy in the office**
 - ▶ **Employers do not need to give employees their own separate copies of the handbook.**

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Language Which Should Not be in a Handbook or other Policy

1. Three Strikes And You're Out
2. Arbitration Program
3. Covenant Not to Compete
4. "Permanent" Employment

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Language Which Should Not be in a Handbook or other Policy (cont.)

5. Discharge "for cause"
6. Probationary period
7. Discussions About Pay
8. Trade Secrets/Confidentiality Agreements

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COMMON HANDBOOK MISTAKES

- Not Being Consistent with Other Documents
- Including too Much Detail on Company Procedures Which can Actually be Used by Employees' Lawyers Against Management
- Not Including Catch-All Language (...This List Includes But is not Limited to ... Absenteeism, Tardiness..

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MISTAKES

- Using Form Handbooks Which Relate to Other States' Laws or Contain Language That has Nothing to do With Your Company

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MISTAKES

- If Your Company is in More Than one State, Not Adopting the Handbook to Each State
- Not Including Required Policies Such as EEO, Harassment, COBRA

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Questions?

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