

# Dusting Off the Employee Handbook

Presented by:

Alexis Pheiffer, Esq. (*PetSmart, Inc. – Senior Counsel*)

Rebecca Winterscheidt, Esq. (*Snell & Wilmer – Partner*)

Joseph Clees, Esq. (*Ogletree Deakins – Shareholder*)



# Handbooks: General Considerations

- Should your organization have one?
- Format
- Style
- Contents
- Policies
- Disclaimers
- Employee Acknowledgment

# Handbooks: Advantages

- Easy way to disseminate information to employees
  - “Quick reference guide” for your workforce
- Create objective rules and criteria for unbiased employment decisions
- Promote consistency
- Easy way to comply with notice requirements
- Establish terms of employment relationship
- Likely to be an exhibit in response to administrative charges and lawsuits

# Handbooks: Disadvantages

- Make employer decisions more rigid
- Old handbooks can linger and haunt you
  - Can you stay on top of updates, legal developments?
- You may fail or forget to follow your own handbook
- Likely to be an exhibit in response to administrative charges and lawsuits

# “Localization” of Employment Law

If you have a multistate (or multi-city) operation, consider:

- How will you account for differences in state law
  - One handbook with addenda?
  - Different handbooks for different states?
- Can you update easily enough to stay current on hot topics?
  - Paid sick/family leave, expanding protected classes, meal/rest breaks, pregnancy accommodations, etc.

# Retaliation

- Beware of retaliation scenarios!
- Numerous types of complaints provide employee protection
- Most prevalent basis for claims
- Easy to prove, difficult to defend
- Include many anti-retaliation provisions in handbook

# Harassment

- Harassment is a form of discrimination
- Tie to EEO (all protected classes, not just sex)
- Clearly explain prohibited conduct
- Define harassment in handbook
  - Quid pro quo
  - Hostile work environment
- Create rule that all employees responsible for reporting harassment
- Explain that company must and will investigate all claims
- State law red flag: California

# Wage & Hour

- Employment classification
  - Clear definitions/descriptions
- Require pre-approval for overtime
- Cover timekeeping procedures
- Include prohibition on working “off the clock”
- Rest periods
- Meal periods
- Another area where state laws differ

# Leave, Accommodations & Nursing

- FMLA Policy
- ADA Policy
- Reasonable Accommodations
- Nursing Mothers
  - “A practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based” (EEOC)
  - Must provide reasonable break time
- Another area with a variety of state/local law variations

# Pregnancy Accommodations

- Governed by state/local law
- Protection over and above federal requirements
- States/cities that have such a law generally require a policy and/or reference in the handbook
- Requirements vary
- April 2016: 17 states, Washington, D.C., and 4 cities had a requirement (e.g., California, Illinois, Maryland, Minnesota, New York City, Philadelphia)

# Workplace Violence

- Zero tolerance policy
- Define and include examples
  - Property damage
  - Threats
  - Domestic abuse
- Explain that discipline, up to and including termination, will be the result
- Warning signs
- Preventative steps
- Reporting workplace violence concerns

# TRANSGENDER ISSUES IN THE WORKPLACE

# Population Estimate and Key Terms

- Gender Identity
- Transgender
- Gender Expression
- Transitioning

# Protections at federal, state and local levels

- Title VII interpretation
- Arizona Executive Order—public employees
- City Ordinances

# Best Practices

- Policy in Handbook addressing transgender issues
- Amend harassment policy to include transgender
- Revise, as necessary, other policies (dress code, etc)
- Training of all employees
- Designation of HR point person
- Transition Plan ready for use
- Proactive Steps addressing bathroom access

# Transition Plan should address the following

- Pre-Transition topics (timing, who should be informed, what info employee wants to keep confidential/shared, anticipated medical leave, name change timing, appointment of HR contact, etc)
- Transition topics (formal name change on internal and government forms, confirm any needed leave, educational workshops, HR ready for questions)
- Post Transition topics (confirmation of date new name & sex, confirm issuance of new ID, nameplate, org chart, benefit/payroll, dress appropriate with designated sex, b-room issue confirmed)
- Identification of info employee wants to keep confidential

# CRIMINAL BACKGROUND CHECKS

# EEOC's 2012 Guidance

“Consideration of Arrest & Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964”

- Exclude based on criminal history if “job related & consistent with business necessity”

Green Factors:

- 1) nature & gravity of offense or conduct;
- 2) time elapsed since offense, conduct, and/or completion of sentence; and
- 3) nature of job held or sought

# EEOC's 2012 Guidance – cont'd.

- Individualized assessment required
- Use of arrest records
  - Generally avoid using if no conviction
- Exception: if charges pending & crime if proven would disqualify person from position due to job-relatedness or business necessity
- “Ban the Box” —Arizona State law still allows, but check local ordinances
- Practical tips:
  - Check your applications- especially if multi-state employer
  - Weigh risk of discrimination lawsuit vs. other potential liability

# MARIJUANA IN THE WORKPLACE



# Federal Controlled Substances Act— (prohibits all marijuana use)

Arizona—Allows use of medical marijuana

- Must be:
  - 1) a qualifying patient (ARS 36-2801.13); and
  - 2) Diagnosed by a physician as having a “debilitating medical condition” (ARS 36-2801.12)
- May receive:
  - 1) 2.5 ounces
  - 2) within a 14 day period
  - 3) from a registered non-profit medical marijuana dispensary

Company has a right to:

- Prohibit employees from using at work
- Prohibit employees from bringing marijuana to work
- Prohibit impairment at work
  
- BUT—employer cannot discriminate against qualified patient in employment decisions.

## Best Practices:

- Have a drug free workplace policy
- Prohibit the use & possession of marijuana at work in that policy
- Policy should be clear no expectation of privacy in desks, cars, etc.
- Train supervisors on signs/symptoms of impairment
- Identify safety sensitive positions

# BULLYING IN THE WORKPLACE



- No federal law expressly prohibiting bullying in the workplace
  - But over 25% of US workers say they have been bullied at work.
- However, such behavior may support a variety of legal claims including:
  - Harassment because of a protected status (Title VII, ADEA, ADAAA, etc.)
  - Intentional Infliction of Emotional Distress
  - Negligent Supervision/Retention
  - Assault

## Where Bullies Congregate:

- Highly powerful people working alongside those with much lower status
- Health care (surgeons)
- Education
- Public service industries

## Best Practices:

- Include “no bullying” policy in your handbook
- Impose a duty to report -extending also to mere observers
- Early reporting and intervention most effective method
- Confront the bully
- Impose a “no jerk” rule and enforce it!

# SOCIAL MEDIA AND BYOD



## Why it's important to have updated policies:

- FLSA (overtime issues & accurate time input)
- NLRA (Section 7 rights)
- Title VII, ADA, ADEA (unequal discipline for postings/harassment)
- Wrongful Termination (based on info found on social media)
- Intellectual property protection

# Social Media - Define company's general policy on use of Social Media

- Written policy in Handbook should include clear guidelines:
- Be respectful (no harassment/bullying/threatening statements)
- Cross reference to other related company policies
- Be honest & accurate
- Express only personal opinions (never act as rep for company)
- Maintain company's confidential/trade secret info
- No "links" to company's website allowed
- Whether use of social media is allowed on work time or company equipment
- Not allowed to speak to media on company's behalf
- Where to direct requests for references when come through social media
- Right of company to monitor anything done on company computer or BYOD linked to company computer
- Consequences for non-compliance
- No retaliation for reporting violation of policy

# BYOD - Need separate policy for BYOD

- 81% of workers in U.S. use personal mobile devices at work, but
  - Less than 10% of companies are fully aware of the devices accessing their networks
- Be sure your BYOD policy addresses the following:
  - Limitation on privacy expectations
  - Off- the-clock work for non-exempt employees (i.e. “don’t check emails after work”)
  - Cross reference to relevant policies
    - Harassment
    - Workplace safety (checking emails while driving on the job)
    - Timekeeping (including ability to “clock in” using phone)

- Access dependent on compliance with company policies
  - Data preservation, storage, and backup
  - Third party use of BYOD device
  - General data security practices (i.e. accessing Wi-Fi at airports, etc)
  - Procedures for lost/stolen devices (remote wiping)
  - Procedures for old or replaced devices
- 
- Training for all employees

# Religious Accommodation Policy

“[Name of company] respects the religious beliefs and practices of all employees and will make, on request, an accommodation for such observances when a reasonable accommodation is available that does not create an undue hardship on the company’s business.”



# Religious Accommodation Policy

“An employee whose religious beliefs or practices conflict with his or her job, work schedule, or with [company name]’s policy or practice on dress and appearance, or with other aspects of employment, and who seeks a religious accommodation must submit a written request for the accommodation to his or her immediate supervisor. The written request will include the type of religious conflict that exists and the employee’s suggested accommodation.”

# Off Duty Conduct

- Employers should be cautious about controlling employees' off-duty behavior
- May run afoul of the NLRA
- Off-duty access to the workplace
- Social media use
- Some states have laws that broadly protect an employee's off-duty conduct



# The NLRA and Employee Handbooks (Cont'd)

The mere maintenance of an overbroad rule tends to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline and is therefore unlawful.

*Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)

# #1 At-Will Disclaimer

I agree that the at-will employment relationship cannot be amended, modified, or altered in any way.

*American Red Cross Arizona Blood Services Region,  
28-CA-23443 (Div. of Judges, Feb. 1, 2012)*

**UNLAWFUL**

# At-Will Disclaimer (Cont'd)

Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employees and the President.

*Windsor Care Centers, 32-CA-087540 (NLRB Division of Advice Memo, Feb. 4, 2013)*

**LAWFUL**

# #2 Gossip & Disparaging Comments

Everyone is expected to be courteous, polite, and friendly to our customers, vendors, and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of [the Company].

*Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012)

**UNLAWFUL**

# Gossip & Disparaging Comments (Cont'd)

Employees that participate in or instigate gossip about the company, an employee, or customer will receive disciplinary action. ... Most people involved in gossip may not intend to do harm, but gossip can have a negative impact as it has the potential to destroy a person's or organization's reputation and credibility.

*Laurus Technical Institute v. Joslyn Henderson*, Case 10-CA-093934  
(Dec. 11, 2013)

**UNLAWFUL**

# Gossip & Disparaging Comments (Cont'd)

[Employees] will not make negative comments about our fellow team members...[and employees] will not engage in or listen to negativity or gossip.

*Hills and Dale Hospital and Danielle Corlis, Case 07-CA-053556 (April 1, 2014)*

**UNLAWFUL**

# Gossip & Disparaging Comments (Cont'd)

You may not make disparaging or defamatory comments about [Company], its employees, officers, directors, vendors, customers, partners affiliates or our, their, products/services.

*Dish Network Corp.*, 359 NLRB No. 108 (April 30, 2013)

**UNLAWFUL**

# Gossip & Disparaging Comments (Cont'd)

## 10 NLRB “Red Flag” Words to Avoid

Abusive

Disruptive

Inappropriate

Derogatory

Harassment

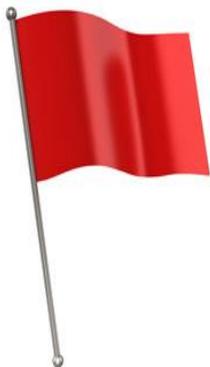
Suggestive

Loud

Offensive

Coercive

Objectionable



# #3 Dress Code

Policy prohibiting “any buttons or logo (unless approved by management)” to be worn on the company uniform.

*Target Corporation*, 359 NLRB No. 103 (April 26, 2013)

**UNLAWFUL**



# Dress Code (Cont'd)

Employees are expected to use good judgment, consider safe practices, and dress appropriately for their job. The Company reserves the right to address an employee's attire, jewelry, or any aspect of grooming which the Company believes to be unsafe, distracting, unsanitary, not promoting customer good will, or the subject of business disruption or complaint.

*Burndy, LLC v. Glass Molders, Pottery, Plastics & Allied Workers Local 39B, 34-CA-65746; Burndy, LLC v. IUE-CWA, Local 485, 34-CA-78077 (Div. of Judges, July 31, 2013)*

# LAWFUL

# #4 Off-Duty Access

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment, or to conduct hospital-related business.... Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

*Sodexo America*, 358 NLRB No. 79 (July 3, 2012)

**UNLAWFUL**

# Off-Duty Access (Cont'd)

Occasionally, circumstances may arise when you are permitted to return to interior areas of the Property after your work shift is over or on your days off. On these occasions, you may obtain prior approval from your manager.

*Marriott International*, 359 NLRB No. 8 (Sept. 28, 2012)

**UNLAWFUL**

# #5 Confidentiality

[The Company] has a compelling interest in protecting the integrity of its investigations. In every investigation, [the Company] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. We must maintain the investigation and our role in it in strict confidence.

*Verso Paper*, Case 30-CA-089350 (NLRB Div. of Advice Memo, January 29, 2013)

# UNLAWFUL

# Confidentiality (Cont'd)

You also need to protect confidential information when you communicate it.

- You should never share confidential information with another team member unless they have a need to know the information to do their job...
- Don't have conversations regarding confidential information in the break room or in any other open area. Never discuss confidential information at home or in public areas.

*Target Corporation, 359 NLRB No. 103 (Apr. 26, 2013)*

# UNLAWFUL

# Confidentiality (Cont'd)

Maintain the confidentiality of [the Company] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how, and technology. Do not post internal reports, policies, procedures, or other internal business-related confidential communications.

*In re Walmart*, Case 11-CA-067171 (NLRB Div. of Advice Memo, May 30, 2012)

**LAWFUL**

# #6 Solicitation/Distribution

Soliciting, distributing literature, selling merchandise, or conducting monetary transactions, whether through face-to-face encounters, telephone, company mail or email, are always off limits (even during meal and break periods) if they are:

- For personal profit
- For commercial purposes
- For a charitable organization...

*Target Corporation*, 359 NLRB No. 103 (Apr. 26, 2013)

**UNLAWFUL**

# Solicitation/Distribution (Cont'd)

Associates are permitted to participate in solicitation and/or distribution of literature outside [the Employer's] facilities during non-working time.

However, non-Associate individuals, groups, and organizations (including non-profit, charitable, service, and religious groups) who wish to solicit on the Employer's property outside its facilities must first obtain permission from the Employer.

*Wal-Mart Stores, Inc.*, Case 13-CA-99526 (NLRB Div. of Advice Memo, August 14, 2013)

**LAWFUL**

# #7 Computer Usage

Company communication systems and the equipment used to operate the communication systems are owned and provided by the Company to assist in conducting the business of [the Company]. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

*Guard Publishing Co., 351 NLRB 1110 (Dec. 16, 2007)*

# LAWFUL

# Computer Usage (Cont'd)

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs, or other online tools utilized for personal use.

*In re Walmart*, Case 11-CA-067171 (May 30, 2012)

**LAWFUL**

# Social Media

Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Employee Agreement, may be subject to discipline, up to and including termination of employment.

*Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012)*

**UNLAWFUL**

# Social Media (Cont'd)

Always be fair and courteous to fellow associates, customers, members, suppliers, or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly to your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet...

*In re Walmart*, Case 11-CA-067171 (May 30, 2012)

# LAWFUL

# Social Media (Cont'd)

. . . Nevertheless, if you decide to post complaints or criticisms, avoid using statements, photographs, video, or audio that reasonably could be viewed as malicious, obscene, threatening, or intimidating, that disparage customers, members, associates, or suppliers, or that might constitute harassment or bullying.

*In re Walmart*, Case 11-CA-067171 (May 30, 2012)

# LAWFUL

# Social Media (Cont'd)

. . . Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion, or any other status protected by law or company policy.

*In re Walmart*, Case 11-CA-067171 (May 30, 2012)

**LAWFUL**

# Media/3<sup>rd</sup> Party Contact

All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

*Karl Knauz Motors*, 358 NLRB No. 164 (Sept. 28, 2012)

**UNLAWFUL**

# Media/3<sup>rd</sup> Party Contact (Cont'd)

Do not contact the media, and direct all media inquiries to the Communications department.

If law enforcement wants to interview or obtain information regarding a company employee...the employees should contact the Security department, who will handle contact with law enforcement agencies....

*DirecTV U.S. DirecTV Holdings, LLC, 359 NLRB No. 54 (Jan. 25, 2013)*

**UNLAWFUL**

# Company Images

A rule prohibiting employees from using the employer's logo, trademark, or graphics, or photographing or videotaping the employer's premises.

*Giant Food LLC*, Cases Nos. 05-CA-064793, 05-CA-65187, 05-CA-064795 (March 21, 2012)

**UNLAWFUL**

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