

## **Communicating Company Policies and Developing Employee Handbooks<sup>1</sup> Employment Roundtable**

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### **I. Communicating Company Policies**

Many companies devote substantial resources to developing corporate policies on a wide variety of subjects, but fall short when it comes to communicating these policies to employees. Unless the company devotes the same energy to educating the employees who are responsible for implementing and complying with corporate policies, the time spent on policy development is largely wasted. In addition, state and federal laws require employers to notify employees of certain employment-related rights and obligations in writing. Consequently, employees need to insure that employees are adequately informed and, if necessary, be able to prove it.

There are many ways to communicate company policy, some of which are more effective than others:

- **Posting:** Under state and federal law, employers are required to post notices of certain rights to which employees are entitled by law (*e.g.*, minimum wage, worker's compensation, family medical leave).<sup>2</sup> Required posters should be placed in a central location accessible to all employees (including those with disabilities). Employers may wish to post their employment policies at the same location. The drawback to this method of communication is that there is no guarantee that employees will read the postings, and no documentary evidence that they received notice of them.
- **Intranet Posting:** Many employers post their policies on a company Intranet. This method has the advantage of enabling policy revisions to be made and posted

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<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

<sup>2</sup> For a list of current posting requirements under Oregon and federal law, see the Appendix at the end of this article.

quickly. However, like hard copy posting, this method provides no guarantee that employees will read the policies, and no documentary evidence that they received notice of them.

- ***E-Mail Distribution:*** There is no guarantee that employees will read their e-mail, but e-mail distribution of policies and policy revisions has the advantage of allowing the sender to print a hard copy of the e-mail contents and distribution list.
- ***Hard Copy Distribution:*** Company policies can be distributed in hard copy through interoffice mail, with paychecks or mailed to an employee's home (with documentation of the mailing kept in each employee's personnel file). Whenever possible, it is a good idea to have employees sign an acknowledgment that they received the policies. A good time to distribute copies of company policies is at new hire orientation, at which time employees may be given the time to read the policies, ask questions about them and acknowledge receipt of the policies in writing. The signed acknowledgement should be retained in the employee's personnel file.
- ***Meetings:*** Company meetings provide a good opportunity to rollout and train employees on company policies. A company policy can be explained and distributed at an employee meeting where employees are asked to sign in and a written agenda is maintained for the meeting (listing the rollout of the new policy). It is important to make sure that employees who miss the meeting nevertheless receive a copy of the policy.
- ***Handbooks:*** Handbooks are probably the most common method of communicating company policies. The optimal time to distribute handbooks is at the time of hire or orientation. Each employee should be required to sign an acknowledgment of receipt, which should be retained in the employee's personnel file.
- ***Training:*** Some policies, such as anti-discrimination and harassment policies, are so important that it is wise to not only distribute them, but to provide employees with training. A copy of any training materials and a list of attendees should be retained.

## **II. Developing Employee Handbooks**

Although employee handbooks can be a double-edged sword, there are many advantages to having one. A well-crafted handbook may provide a first line of defense in defending employment-related claims against the company. Conversely, a poorly drafted handbook may increase an employer's exposure to wage and hour violations and claims for breach of contract and discrimination. It is, therefore, critical that employers carefully consider the type of information they wish to include in their handbook, and insure that the information included accurately and unambiguously sets forth the company's intent and complies with state and federal law.

- ***Why Employers Should Have a Handbook***

Handbooks may be used to advise employees of the company's mission, goals, expectations, policies, procedures and benefits. Clearly articulating your policies, procedures and benefits in writing lets employees know what is expected of them and what they can expect from you. A handbook may also be used to insure the consistent application of policies and benefits, insure compliance with the law and avoid employment-related claims against the company.

- ***Handbooks Define Expectations and Benefits***

Employees need to know what is expected of them. For example, they need to know when to be at work, what to do if they can't report to work, how to report their time, when they can take breaks and lunch, what conduct is and is not acceptable, what to wear, and what to do if they have a problem or suggestion. It is also helpful to tell employees what will happen if they don't conform to the employer's expectations. Employees want to know when, what and how they will be compensated.

- ***Handbooks Can Promote Equal Treatment of Employees***

Written policies provide a uniform statement of company policy and benefits. They provide a road map for those responsible for implementing company policy. Maintaining and following written policies can help to eliminate disparity in the way employees are treated.

- ***Handbooks Can Promote a Perception of Fairness***

The perception of unfair treatment is often the catalyst that leads employees to file claims against an employer or join a union. Clearly articulating expectations can help employers fairly evaluate performance, implement policies and procedures on a consistent basis and prevent a perception of unfair treatment. Employees are less likely to perceive an employer's conduct as unfair when they are told in advance what is expected of them, what will happen if they deviate from those expectations, and that all employees will receive wages and benefits based on consistently applied criteria.

- ***Handbooks Can Improve Communication***

Many employees fail to address questions and concerns with management because they are embarrassed or fear retaliation. Written policies that address the available and appropriate channels for communicating ideas, questions and concerns can facilitate an atmosphere in which employees feel comfortable raising ideas, questions and concerns in a positive way.

- ***Handbooks Can Evidence Compliance with the Law***

Any employer who has responded to an administrative charge or defended an employment claim knows that one of the first questions they will be asked is whether they have a policy addressing the conduct or actions at issue. Written policies documenting the employer's policies can provide key evidence of the nature of the employment relationship and the employer's compliance with the law.

- ***Handbooks Can Decrease the Potential for Litigation and Limit an Employer's Liability***

Too often, employers formulate a response to a situation without considering whether they will be establishing a precedent for future actions or if their response is consistent with actions taken previously in similar circumstances. Disparate treatment of similarly situated employees may result in claims of unlawful discrimination. Articulating employment policies in writing forces employers to consider their options in advance, be more consistent, and avoid crisis management. In addition, written policies may be used to defend claims of oral promises and benefits the employer never offered or intended.

- ***Drawbacks to Having a Handbook***

A substantial number of the benefits to be derived from maintaining a written handbook will be undermined by a handbook that is not well written and current. Poorly drafted policies may unintentionally expand an employer's obligations and liability for benefits. An employer's failure to follow its own policies may also lead to claims for breach of contract and discrimination. In addition, the failure to maintain policies that comply with the law, which changes frequently, may be used as evidence of an employer's noncompliance.

#### **WHAT TO SAY AND HOW TO SAY IT**

What you choose to include in your handbook and how you say it can have a profound effect on the way employees feel about the company. What you communicate to employees in your handbook can set the tone for the entire workplace. To the extent possible, policies should be developed and articulated in ways that are consistent with your firm's culture. Policies should be clear, concise and in plain English. It is often helpful to explain why the policy is important and provide examples of what the policy requires.

It is equally important to avoid making promises you are unable or unlikely to keep. Promises of specific treatment or that are inconsistent may give rise to unintended contractual obligations.

- ***Maintaining the At-Will Employment Relationship***

In most states, private employment is at-will unless the parties agree otherwise. At-will employment means that either party may terminate the employment relationship at any time, with or without cause or advance notice. Oral or written promises can undermine or nullify the at-will nature of the employment relationship. It is, therefore, important for at-will employers to develop handbooks that do nothing to undermine their right to terminate employees at will.

The first step toward preserving the at-will relationship is to tell employees that they are employed at-will, and limit the circumstances, if any, under which that relationship may be modified. Handbooks should include this information in a disclaimer at the front of the handbook, and in a written acknowledgment that the employee signs. The signed acknowledgment should be kept in the employee's personnel file.

It is equally important that the handbook not contain language or promises of specific treatment that are inconsistent with at-will employment. For example, employers should avoid the use of

the term “permanent” employee, or “cause” or “just cause” in connection with termination decisions. Try to express compensation in terms of hourly, weekly or monthly as opposed to annual pay.

A progressive discipline policy that promises a lock step procedure will always be followed to address poor performance and misconduct is inconsistent with the notion that the employer can terminate employment at any time.<sup>3</sup> While progressive discipline may be desirable in some cases, it should not be promised in all cases. A progressive discipline policy should reserve to the employer the discretion to skip steps in the procedure or proceed with termination in the first instance.<sup>4</sup>

Unless they are used solely as a waiting period for benefit eligibility, maintaining “probationary” or “introductory” periods of employment may also conflict with the concept of at-will employment. Employers typically describe these periods as a time when the parties get to know each other and employment may be terminated at any time, with or without cause. As this is true of at-will employment generally, employees may get the impression that there is some permanency to the employment relationship once the probationary or introductory period is over.

- ***Avoiding Unintended Contractual Obligations***

An employer’s unilateral promise of specific treatment or benefits becomes binding on the employer if an at-will employee continues employment with knowledge of the employer’s promise.<sup>5</sup> Promises in a handbook may, therefore, create binding contractual obligations. This is true even if the handbook is distributed long after the employment relationship begins.<sup>6</sup>

Handbooks are subject to the same principles of construction as any other contract.<sup>7</sup> If the terms of a handbook are ambiguous, it is necessary to determine the intent of the parties. When those terms become the subject of a dispute, the meaning of the ambiguous terms is determined by the

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<sup>3</sup> A well-drafted disclaimer of at-will employment may be sufficient to retain an employee’s at-will status even when other policies provide that a specific disciplinary procedure will be followed. However, a less-than-perfect disclaimer may enable a terminated employee to argue that the meaning of the conflicting policies is ambiguous, necessitating a trial. *See, e.g., Mobley v. Manheim Services Corporation*, 133 Or App 89, 93, 889 P2d 1342 (1994), *review denied*, 321 Or 47, 892 P2d 1024 (1995); *Lawson v. Umatilla County*, 139 F3d 690, 693 (9<sup>th</sup> Cir 1998).

<sup>4</sup> Employers should nevertheless be consistent in their treatment of similarly situated employees to avoid claims of unlawful discrimination.

<sup>5</sup> *See, e.g., Sabin v. Willamette-Western Corp.*, 276 Or 1083, 1089, 557 P2d 1344 (1976) (employer’s vacation policy made known to employee after he accepted employment was binding on employer); *Rose City Transit v. City of Portland*, 271 Or 588, 592-593, 533 P2d 339 (1975) (pension and disability plan created by employer constituted unilateral offer to at-will employee that was accepted by continued employment).

<sup>6</sup> *See, e.g., Domingo v. Copeland Lumber Yards*, 81 Or App 52, 55, 724 P2d 841 (1986) (written warning in handbook distributed years after plaintiff’s employment began was binding on employer); *citing Yartzoff v. Democratic Herald Publishing Co.*, 281 Or 651, 656-657, 576 P2d 356 (1978).

<sup>7</sup> *Swartout v. Precision Castparts*, 83 Or App 203, 206, 730 P2d 1270 (1986).

trier of fact (typically a judge or jury),<sup>8</sup> who will often resolve the question based on the *employee's* reasonable expectations.<sup>9</sup>

The best way to avoid the risk that a judge or jury will get to determine what you intended to say and impose liability on your company for unintended benefits is to make clear that your handbook is not a contract. This can be accomplished through the use of a clear and conspicuous disclaimer. At a minimum, a disclaimer should include the following points:

- The policies are only guidelines.
- The handbook is not an express or implied contract.
- The handbook does not guarantee employment for any definite period of time, and employment is at-will.
- The at-will nature of the employment relationship may not be modified except in a written agreement signed by a specified representative of the company.
- The policies and benefits in the handbook may be modified or revoked at any time.

A typical disclaimer might read as follows:

*The purpose of this handbook is to establish some company rules and regulations that can be used as a guideline by our employees. Based on special needs or circumstances, management may find it necessary to deviate from policies set forth in this handbook.*

*This handbook is not to be construed as an express or implied contract for employment or benefits. All employment at Company is at-will, which means that either Company or you may terminate the employment relationship at any time, for any reason, with or without cause or notice. This at-will policy may not be modified except in a written agreement signed by the President of Company and you.*

*In providing employees with this manual, our intent is to provide information that can be used as a working tool. Company retains the right to modify, revoke or update any policy at any time for any reason.*

The disclaimer language should be repeated in a written acknowledgment that the employee signs. A typical acknowledgment might read as follows:

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<sup>8</sup> *Domingo, supra*, 81 Or App at 56.

<sup>9</sup> *See, e.g., Seibel v. Liberty Homes, Inc.*, 305 Or 362, 365, 752 P2d 291 (1988). In this case a 55-year-old employee returning to work following a work-related injury was offered a light duty job. When asked whether the job was permanent, the manager said “as long as we have production to run.” The employee was later fired for poor performance and he sued for breach of a contract for lifetime employment. The court acknowledged that a jury could interpret the manager’s statement as meaning that a light duty job would exist, not that the job was promised to plaintiff until he retired. However, the court said that a jury could also reasonably find, as this one did, the employee reasonably understood the manager’s statement as an assurance that he would have work as long as the work he did was needed, and the job would otherwise last until he retired.

## ACKNOWLEDGEMENT OF RECEIPT OF EMPLOYEE POLICY MANUAL

*I acknowledge that I have received and read a copy of Employer's Policy Manual. I agree to abide by the policies in this manual, and any other policies or procedures adopted by Company.<sup>10</sup> I understand that this manual supersedes all previously-issued manuals, and that Company may change, modify or replace policies and procedures in this manual, with or without notice to me. I also understand that the policies and procedures contained in this manual do not create an employment contract and that no written contract for employment exists.*

*I further understand and acknowledge that either Company or I may terminate the employment relationship at any time, for any reason, with or without cause or notice, and that the at-will nature of my employment may not be modified except in writing, and signed by the President of Company.*

\_\_\_\_\_  
Employee Signature

Date Signed \_\_\_\_\_

- **Notice And Posting Requirements**

There are no laws mandating that employers maintain and distribute employee handbooks. However, there are numerous federal and state laws that require employers to provide employees with notice of employment-related rights and benefits.<sup>11</sup> These requirements may influence the subjects an employer chooses to address in an employee handbook and dictate the content. For example, the law requires employers to provide notice to employees of the following rights and benefits, some of which must be included in an employee handbook if the employer maintains one (this list is not all inclusive):

1. *Family Medical Leave Act (FMLA), 29 USC § 2601 et seq.* This law requires covered employers (those with 50 or more employees) who maintain written guidance for employees on employee benefits or leave rights to include written information regarding employees' FMLA entitlements and obligations. 29 CFR § 825.301.

2. *Employee Retirement Income Security Act (ERISA), 29 USC § 1001 et seq.* This law requires certain severance pay plans to be in writing and distributed to all covered employees.

3. *Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 USC § 1161-1168.* This section of the law requires covered employers (generally those with 20

<sup>10</sup> An agreement to abide by policies may be used as evidence of a contract, and should not be used in states where at-will and contract disclaimer language is not sufficient to resolve the issue. Some employees are also less willing to sign acknowledgments containing an agreement to abide by policies.

<sup>11</sup> A list of the current posting requirements for Oregon employers is set forth in the Appendix to this memorandum.

or more employees) to provide employees with written notice of their right to continue group health insurance at their own expense upon the occurrence of certain qualifying events.

4. *Executive Order 11246 (see also 41 CFR § 60-1) and the Rehabilitation Act of 1973, 29 USC § 701 et seq.* These laws require certain federal contractors, subcontractors and grantees to develop a written affirmative action policy.

5. *Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq.* Although this law does not require employers to maintain written policies applicable to discrimination and harassment, recent case law confirms that it is extremely difficult to successfully defend a claim of discrimination or harassment without them. *See, e.g., Faragher v. City of Boca Raton*, 118 SCt 2275 (1998); *Burlington v. Ellerth*, 118 SCt 2257 (1998).

6. *The Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, 45 CFR § § 160,164, contains many employment-related mandates that will affect health plans and medical providers as early as April of 2003. HIPAA's requirements include posting of written notice regarding the permitted uses and disclosure of health information.

Employers should maintain and distribute the following **“must have”** policies in writing, whether or not they elect to develop an employee handbook:

- ***Family Medical Leave Policy***

Employers covered by the FMLA (and/or state family medical leave law) and who maintain an employee handbook or other written guidance to employees concerning employee benefits or leave rights must include in the handbook or other document information concerning the employer's FMLA policy and the employees' FMLA entitlements and obligations. The failure to include in the written notice all of the employees' obligations and limitations on the employees' right to and use of leave may affect the employer's ability to impose those obligations and limitations.

At a minimum, the notice should cover the following topics:

- Employee eligibility
- An explanation of what constitutes a “serious health condition”
- The types and amount of leave to which the employee is entitled
- Whether the leave is paid or unpaid
- How to request leave (including notice requirements)
- How the period of leave is measured
- Medical certification requirements, if any, for obtaining leave and returning to work (including second and third medical opinions and recertification)
- Scheduling of treatment
- Call-in requirements, if any
- The employees' payment obligations, if any, for the maintenance of health benefits while on leave
- Whether employees are required to exhaust paid leave benefits (vacation, sick leave, paid personal leave) during family medical leave, and the order in which such benefits will be used

- Whether the leave will run concurrently with worker's compensation, disability or other leave
- Reinstatement rights and limitations
- The effect of an employee's failure to return to work following a family medical leave
- ***Equal Opportunity, Discrimination and Harassment Policies***

An EEO policy communicates a policy of fairness in employment decisions and provides important evidence of the employer's policy against discrimination. A well-written EEO policy should include the following:

- A statement that the employer provides equal employment opportunities without regard to any protected status (race, color, religion, national origin, sex, sexual orientation, age, marital status, source of income, disability, veteran or other protected status).
- A statement that the employer does not discriminate.
- The application of the policy to all facets of employment (e.g., hiring, placement, promotion, transfer, and discharge; recruitment, advertising, and solicitation for employment; compensation and benefits; selection for training).
- The criteria used for making employment decisions.
- The employer's policy on reasonable accommodation of disabilities and religion (these may be set forth in separate policies).

A harassment policy is necessary to inform employees of the types of conduct that constitute harassment and the employer's prohibition on and unwillingness to tolerate harassing behavior. The absence of a meaningful harassment policy and complaint procedure may deprive an employer of an otherwise valid defense to a claim of unlawful harassment.

At a minimum, a harassment policy should set forth in clear, understandable terms:

- A statement that the employer prohibits harassment in any form on the basis of an individual's protected status, whether by employees, customers or vendors.
- A definition of "harassment" (both sexual harassment and harassment based on any other protected status)
- Specific examples of the type of conduct prohibited by the policy.
- The circumstances in which the conduct is prohibited (e.g., in the workplace, on business trips, at work-related functions, etc.).
- A requirement that employees report harassment.

Policies prohibiting discrimination and harassment are not sufficient unless the employer also maintains a procedure for reporting violations, investigating complaints and remedying violations. The procedure should be equally available for reporting and addressing discrimination (violations of the EEO policy) and harassment. A complaint procedure should include the following:

- The methods by which employees may report discrimination and harassment, and the individuals authorized to receive a report (this should provide alternate

avenues for reporting violations to insure that the employee can bypass the harasser).

- A requirement that anyone who receives a report or complaint immediately inform one of the individuals authorized to receive a report.
- An explanation of what will happen when the employer receives a complaint, including the consequences of violating the employer's policies prohibiting discrimination and harassment.
- A commitment to handle the complaint with discretion (do not promise absolute confidentiality).
- A requirement that employees who report violations of discrimination or harassment or participate in an investigation maintain confidentiality to protect privacy.
- A prohibition on retaliation for reporting violations or participating in a harassment investigation.
- ***Automated Systems Policy***

Due to the potential for employees to misuse voicemail, e-mail and/or the Internet at work, the employer's need to make sure employees are not misusing these systems, and the serious civil and criminal penalties that may attach under state and federal law for improperly monitoring and/or accessing electronic transmissions, it is critical to maintain a written policy governing the appropriate use of automated systems. Such policies should contain the following elements:

- A statement that all of the Company's automated systems, including electronic mail, voice mail, Internet access, and electronic storage systems, are Company property, and are not confidential.
- A statement that the Company reserves the right to access, monitor, and review these systems at any time, and to read and retrieve messages.

In addition, employers should include guidelines for appropriate use of the Company's automated systems. Some examples may include:

- Whether systems may be used for non-business (personal) use
- A requirement of courtesy at all times (no yelling (use of all capital letters) or profanity)
- A prohibition on all e-mail and Internet content that would violate the company's discrimination and harassment policies
- A prohibition on spamming (indiscriminate distribution of commercial, religious, or political messages)
- A prohibition on reading, intercepting, accessing, copying, using, or disclosing e-mail communications directed to others without express authorization
- Whether access must be password protected

- Whether employees are required to log-off each day
- Prohibition on accessing Internet sites that contain sexually explicit materials, news groups dedicated to hate or violence, gambling, job searches, etc.
- Whether employees are permitted to download any software from the Internet
- Prohibition on copying licensed and copyrighted materials

The foregoing list is not exhaustive.

- ***Drug and Alcohol Policy***

Certain federal contractors, subcontractors, grantees and recipients of federal funds are required to comply with the Drug Free Workplace Act (DFWA).<sup>12</sup> Among other things, the DFWA requires covered employers to maintain and distribute a written drug free workplace policy to all employees, and mandates the elements that must be contained in the policy. For example, the policy must set forth specified conduct that is prohibited, the consequences for violating the policy and the requirement that the employee report within five days any conviction for a criminal drug violation occurring in the workplace.<sup>13</sup> Employers who conduct drug and alcohol testing should also maintain written drug and alcohol policies that address the circumstances under which the employee is subject to testing.

- ***Confidentiality of Health Information***

Covered employers must adopt employment policies in compliance with the new HIPAA regulations governing the protection of health information. Aside from HIPAA's posting requirements, the act requires covered employers to do the following:

- Designate a privacy officer responsible for the development and implementation of policies and procedures for compliance
- Designate a contact person responsible for receiving complaints regarding disclosure of health information
- Conduct employee training on the policies and procedures regarding health information (training must be completed prior to the compliance date, new employees must be trained within a reasonable period after hire, and the training must be documented in written or electronic form)
- Implement appropriate administrative, technical, and physical safeguards to ensure the privacy of health information and to prevent any use or disclosure that is in violation of the regulation
- Implement, enforce and document sanctions against employees for failure to comply with the privacy policies and procedures

Many of these mandates will need to be reflected in written employment policies and procedures.

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<sup>12</sup> See 41 USC § 701, *et seq.*

<sup>13</sup> See 41 USC § 701(a)(1)

- ***Meal and Break Policy***

Most state wage and hour laws require employers to provide non-exempt employees with mandatory meal and break periods. Employers should evidence their intent to comply with these laws by developing a written meal and break policy, under which employees are *required* to take at least the required meal and break periods. If the law prohibits skipping or combining meal and/or break periods (as Oregon law does), this prohibition should also be set forth in the policy.

- ***Vacation and Sick Leave Policies***

Countless employment disputes revolve around what benefits were promised. To avoid the inevitable wage claim for vacation or sick leave, employers who provide paid vacation and sick leave benefits should maintain a written policy that includes the following information:

- Eligibility
- How sick/vacation leave is accrued (when accrual begins, accrual rate, maximum annual accrual)
- When accrued vacation/sick leave may be used
- Whether vacation/sick leave may be taken in advance of accrual
- Whether accrued vacation/sick leave may be carried over from year to year
- The purposes for which accrued vacation/sick leave may be used
- Whether accrued vacation/sick leave may be cashed out
- Whether unused accrued vacation/sick leave is paid out on termination of employment

- ***Employment Policies Questionnaire***

Employers should carefully consider what, if any, additional policies are necessary or desirable. Whatever policies are included should be grouped together by subject matter to make the handbook more accessible and meaningful for employees.

The following topics may be appropriate based on the nature of the work, whether the company is public or private, high tech or not:

***Introduction***

- Mission
- History
- Organization Statement

***Employment Policies***

- Affirmative Action: *Does the company have state or federal contracts or receive federal funding?*
- Union Issues (e.g., solicitation): *Is the company unionized? Is this seen as a future possibility?*
- Orientation Procedure
- Employment of Relatives

- Business and Work Hours: *Does the company mandate certain hours of work? Is this necessary?*
- Flextime
- Telecommuting
- Performance Evaluations
- Employee Training
- Exit Interviews
- Termination of Employment
- Personnel Records
- Safety

### ***Wage And Salary Policies***

- Define Work Week
- Employment Classifications: *Exempt/Nonexempt. Does the company use temporary, part-time or leased employees? Is benefit eligibility determined by employment status?*
- Time records: *What are the Company's procedures for timekeeping? (Clock in? Sign in? Time sheets?)*
- Pay Computation: *How are employees compensated?*
- Commissions: *How are commissions calculated? When are they earned? When are they paid? What happens to commissions on termination of employment? Does the company provide a draw or advance against commissions? Is the draw/advance recoverable by the company? Does the company "charge back" in any circumstances?*
- Deductions from Pay: *What amounts are ordinarily withheld? What other amounts may employees have deducted from pay (401K, insurance premiums, etc.)*
- Pay Periods: *When is payday (bi-monthly, monthly)? What happens if it falls on a weekend or holiday?*
- Bonuses: *Does the Company provide bonuses? What are the criteria/terms?*
- Pay Adjustments
- Overtime: *Must employees work overtime? Do holidays and other paid leave days count toward overtime? How is overtime calculated?*
- Pay Advances
- Travel/business expenses: *Are business expenses advanced or reimbursed? Must they be approved in advance? Must employees document their expenses and/or turn in expense reports? Is there a limitation on how much time employees have to turn in their expenses or provide documentation?*

### ***Employee Benefits And Services***

Employers should include a short statement outlining each of the benefits provided to employees. To the extent any of these benefits are covered by ERISA, employers should state that the plan documents control in the event of any conflict between the statements in the handbook and the plan.

- Direct deposit
- Profit sharing
- Stock options
- Pension/401K plans
- Group life insurance
- Group health insurance
- Dental insurance
- Vision care
- Disability insurance
- Holidays: *Which holidays does the company recognize? Do employees have to work scheduled days before and after the holiday to receive holiday pay? What happens when a holiday falls during an employee's vacation or leave of absence? What do employees receive as holiday pay?*
- CompTime
- Bereavement Leave: *How does the company define "family member"? How much leave is permitted? Is the leave paid or unpaid?*
- Military Leave: *Does the company provide benefits in excess of what the law requires?*
- Jury Duty: *Is the leave paid or unpaid? If paid leave is provided, for how long? Must the employee report to work after jury service? Must the employee turn over jury pay?*
- Election Leave: *Does state law require time off for voting?*
- Tuition Assistance: *Does the company provide reimbursement or an advance? Must the education be related to work? Must employee achieve a minimum grade to receive reimbursement? Is pre-approval necessary?*
- Child Care: *Does the company provide, or does state law require, time off for school-related activities? Does the employer contribute to childcare expenses?*
- Employee Discounts: *Does the company have any products or services employees may purchase for a discount?*
- Credit Union
- Relocation Expenses: *Are there any circumstances in which relocation expenses must be repaid?*
- Employee Assistance Programs
- Outplacement
- Severance Pay
- Employee Referral Bonuses: *Must the referred employee work a minimum period for the referring employee to receive a bonus?*

### ***Standards of Conduct***

- Standards of Behavior
- Attendance Standards
- Disciplinary Procedures
- Confidential Information
- Smoking
- Outside Employment: *Does the Company restrict outside employment or require disclosure of second jobs?*

- Dress Code
- Conflict of Interest
- Gifts and Gratuities
- Business Ethics
- Insider Trading: *Is the company publicly traded?*
- Violence
- Searches: *Does the company have a drug and alcohol or violence policy that requires searches as part of its enforcement mechanism?*

### ***Employee Communications***

- Employee Relations Philosophy: Does the Company have an open door policy? What should employees do if they have a complaint or an idea?
- Bulletin Board: Who can use it and for what purposes? What is employer's main method of communicating with employees?
- Grievance Procedure: Does the Company want to have a formal internal mechanism for resolving disputes? Is the procedure available to address termination of employment?
- Arbitration

### **HANDBOOK REVISIONS**

In spite of an employer's stated right to modify a handbook at any time, the fact is that a revision probably will not be effective against an employee who had no notice of it. Therefore, it is critical that employees be notified in a timely fashion when changes in policies and procedures are made.

The best practice is to distribute changes in writing and have employees sign an acknowledgment of receipt. If this is not practical, the employer should find some other way to document that all employees received the policy (see Communication of Company Policies, *supra*).

Due to the possibility of a dispute over the meaning of a handbook provision long after a handbook is revised, it is a good idea to keep copies of all handbooks and all revisions for a reasonable period of time (at *least* as long as the statute of limitations on a breach of contract action which, in Oregon, is six years). Alternatively, the company should maintain a history of revision dates and the substance of the revision for each policy.

### **Electronic Signatures for Employee Handbooks and other Employee Records**

On June 30, 2000, Congress enacted the federal Electronic Signatures in Global and National Commerce Act ("E-Sign").<sup>14</sup> The Act eliminated some of the legal barriers to the use of electronic technology to form and sign contracts, collect and store records, and send and receive various types of notices and disclosures. For example, the Act provides that no contract,

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<sup>14</sup> Public Law 106-229 (2000).

signature, or record shall be denied legal effect solely because an electronic signature or record was used in its formation.<sup>15</sup>

E-Sign applies broadly to commercial, consumer and business transactions affecting interstate or foreign commerce. A variety of other legislation and administrative regulations dealing with electronic records and signatures have since been enacted or are currently underway. Many states have enacted some version of the Uniform Electronic Transactions Act (UETA), which also validates the use of electronic records and signatures (and may preempt the E-Sign Act in some instances).<sup>16</sup> The UETA includes some additional topics not encompassed by E-Sign, such as the admissibility of electronic records, the effects and correction of errors, the determination of where and when electronic records are sent and received, and applicable party consent requirements. In Oregon, related legislation includes the Oregon Electronic Signature Act,<sup>17</sup> which authorizes the use of electronic signatures and affords them the same force and effect as a written signature.

The cumulative effect of E-Sign, UETA, and related legislation is that employers are a few steps closer to achieving a “paperless” work environment.<sup>18</sup> This possibility has many advantages in a Human Resource organization. For example, according to an article in eWeek from ZDWire, GMAC Commercial Mortgage Group Corp. decided to go paperless internally by utilizing a digital signature system that allows employees to sign documents electronically, using ApproveIt/ePersona software from Silanis Technology (*see generally*, [www.silanis.com/](http://www.silanis.com/)).<sup>19</sup> One advantage to utilizing such a process with employees is that it prepares the organization for the potentially more complicated task of exchanging electronic signatures and documents with business partners, customers and state and federal agencies. GMAC started with employees signing up for benefits electronically, and then progressed to having employees sign their performance appraisals electronically. Both processes can save time and prevent “lost paper” problems.

It is expected that federal and state agencies will increasingly permit the use of electronic records and electronic signatures. However, the full force and effect of the digital signature laws is yet to be determined, and problems with authentication of signatures, technology barriers, and employee resistance must also be addressed in order to implement the idealized “paperless” environment. Employers who wish to implement paperless programs, such as distributing

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<sup>15</sup> §101(a).

<sup>16</sup> *See* McBride Baker & Cole’s electronic commerce and digital signature web page at [www.mbc.com/ecommerce/ecommerce.asp](http://www.mbc.com/ecommerce/ecommerce.asp), which comprehensively summarizes state and federal legislation.

<sup>17</sup> ORS 192.825, *et seq.* *See also*, HB 2040 (2001), which directs the Oregon Department of Administrative Services to adopt rules for the use of digital signatures by state agencies, and the Oregon Uniform Electronic Transactions Act, HB 2112 (2001), which adopts UETA and applies only to parties who agree to conduct transactions by electronic means.

<sup>18</sup> *See generally*, Martha Priddy Patterson, Moving to the Paperless HR Department: The New Electronic Signature Law’s Potential, [www.benefitslink/articles/paperless000801.shtml](http://www.benefitslink/articles/paperless000801.shtml) (discussing applicability to 401K plans); Broc Romanek, Electronic Communications with Optionees: How to “Electrify” Your Stock Option Plan, 3 No. 7 Wallstreetlawyer.com: Securities in the Electronic Age (Dec. 1999).

<sup>19</sup> Matt Hicks, Sign of the times: Digital sigs, 2001 WL 412283 (July 24, 2001).

notices and policies electronically and obtaining signatures upon receipt (including employee handbooks) must be willing to invest in technology, training and record management and retention planning. This appears to be the wave of the future.

## APPENDIX

The following is a list of federal and Oregon posting and notice requirements. A current list of required posters and notices and how to obtain them is available on the Bureau of Labor and Industries web site, at <http://www.boli.state.or.us/civil/postings.html>. As employment laws change frequently, employers should be confirming their compliance with posting and notice requirements periodically (at least annually).

### **Federal Posting and Notice Requirements**

<i>Poster/Notice</i>	<i>Who Must Post</i>
Federal Minimum Wage Poster	All employers subject to the Fair Labor Standards Act
Polygraph Protection Act Notice	Employers with 15 or more workers
Family and Medical Leave Poster	Employers with 50 or more workers during 20 weeks of the year
"The Law" Poster	Employers with 15 or more employees during 20 weeks of the year (including employment agencies and labor organizations). ADA required postings are included in this poster.

### **State Posting and Notice Requirements**

State Minimum Wage Poster	All employers in Oregon, except federal government employers
Family Leave Poster	Employers with 25 or more employees in Oregon
Job Safety and Health Poster	Employers with one or more employees
Worker's Compensation	All employers with one or more workers Notice of Compliance
Employment Insurance Notice	Employers with at least a \$225 payroll in a (Form11) calendar quarter and employers with one or more workers during 18 different weeks in a calendar year