

DRAFTING THE EMPLOYEE HANDBOOK

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POLICIES TO INCLUDE

The policies that you decide to include in your handbook, and the extent of the information that you provide in that policy, will be largely dependent upon your reasons for developing the handbook (what you are trying to communicate), the nature and culture of your organization, the legislation that applies to your organization, and whether or not your employees are represented by a union.

A company may have more than one goal for its handbook, but will likely be able to determine those goals which it values more than others, and can focus its handbook accordingly.

A company whose main goal is to avoid or successfully defend litigation will include detailed information in its handbook in those areas where litigation is most prevalent or those areas which are heavily legislated. These areas include confidentiality of employer information; harassment; alcohol and drug use; attendance, lateness and absenteeism; conflicts of interest; email and internet use; discipline and termination; ownership of corporate information; and occupational health and safety. A company may have as its goal improving employee relations. Its handbook may focus on compensation practices, benefits (group medical and dental and pension benefits), vacation, holidays, leaves with pay. Another goal of the handbook could be to satisfy the business needs of the organization. A handbook for such a company may focus on recruitment and

retention practices, such as referral bonuses, employer-sponsored education, job training and development, mentoring, and advancement opportunities.

Another factor to consider in drafting the handbook is the ability of the organization to administer the policies it sets out. As will be discussed later, if a policy is implemented by an employer, the law expects the employer to live up to its end of the bargain and, where the policy is in any way ambiguous, will interpret the policy in favour of the employee. It is important, therefore, that the organization is able to follow its own policies. For instance, if a progressive discipline policy is set out in the handbook, managers must be understand process and their responsibilities under it. If a handbook sets out the procedure to follow upon receipt of a harassment complaint, the procedure must accord with the organizations structure and capabilities.

Another consideration is the purpose of the handbook is the level of sophistication of those who are enforcing it. At many companies, large or small, individual managers, not human resources staff, carry out the “front line” human resources functions. Where managers are knowledgeable, where policy manuals exist, or where there is a human resources department readily available to assist the manager, the information in the handbook does not need to be detailed and specific. Where managers are not knowledgeable or where guidance is not readily available, the handbook can be used as an instructional tool for managers as well as a guide for employees.

One should also consider that there may exist specific requirements that are unique to their organization which may not normally be included in standard employee handbooks or policy manuals. . For instance, employers who need their employees to be bonded may wish to explain in the handbook the consequences to employees who cannot obtain, or who lose, his or her qualifications to do the work that is required of them in their position.

It is very important that each company develop the handbook that is best suited to its needs. One of the biggest mistakes that a company can make is to adopt policies or a handbook belonging to another organization. Not only will the goals of the company not be achieved, the information will not be useful to employees. It will be difficult if not impossible for the managers to apply the policies in the handbook with any consistency. From a legal point of view, the one thing that is worse than not having a policy at all is not following the policy, or policies, that you have in place.

Remember as well that there many ways that information can be communicated to employees, and not all of it needs to be contained in a handbook. Creating too voluminous a work will decrease the chances of the employees reading (and retaining) the information. The whole purpose of the project is to get useful information into the hands of employees.

APPLICABLE LEGISLATION AND COLLECTIVE AGREEMENTS

Private companies operating in Ontario can be subject to one of two different legislative regimes depending on whether they are federally or provincially-regulated. Federally-regulated companies are subject to the *Canada Labour Code*, R.S.C. 1985, c. L-2, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5¹, *Employment Equity Act*, 1995, c. 44, to name a few. Provincially-regulated companies are subject to the *Employment Standards Act, 2000*, S.O. 2000 c. 41, the *Human Rights Code*, R.S.O. 1990 c. H.19, the *Pay Equity Act*, R.S.O. 1990 c. P.17, the *Labour Relations Act*, 1995, S.O. 1995 c. 1, Sched. A, the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, and the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16 Sched. A, among others.

It is important to remember, when drafting your employee handbook, that your company's policies must meet the minimum requirements of the applicable law. Falling below that standard will invalidate your policy, and may in some circumstances invalidate other policies in your handbook. The most obvious example of minimum requirements is minimum notice for severance and termination pay. The Ontario *Employment Standards Act* stipulates minimum

¹Which may apply as well to Ontario companies in the absence of provincial legislation.

severance and termination pay requirements for laid-off workers based on their years of service and also the payroll of the company. If your handbook sets out severance and termination pay entitlements that would result in an employee receiving less than the *Employment Standards Act* entitlement, your termination and severance policy would be invalid. Should that policy be so interrelated with the other terms and conditions of employment that they cannot be considered in isolation, then those other policies may also be deemed to be invalid.

Some laws actually require that certain minimum amount of information be communicated to employees. For instance, the *Personal Information Protection and Electronic Documents Act* requires that employers advise employees, when collecting personal information, the reason why the information is required and the purposes for which it will be used. Consider using the employee handbook as one of the methods for communicating this information. As well, both the *Occupational Health and Safety Act* and Part II of the *Canada Labour Code* require that employees be advised of their right to refuse unsafe work. In appropriate circumstances, the employee handbook is an effective way to communicate this information and meet this requirement.

Where collective bargaining agreements exist, many (if not all) of the terms and conditions of employment will be set out in that agreement. In this case, not only is there no need to set these terms and conditions out again in an employer drafted employee handbook, but inadvisable. First, there is a risk that

the handbook will cause confusion for unions and employees if it uses different language than that used in the collective agreement. Second, if the information contained in the handbook gives the employees more benefits or entitlements than are contained in the collective agreement, the employer may be accused of interfering with the union. If the information is interpreted to constrict or withdraw employment rights, the employer will be accused of violating the agreement. It is possible that the handbook could be useful to communicate information other than that included within the purview of the collective bargaining agreement, however extreme caution must be used and legal advice is absolutely necessary.

RESEARCHING THE POLICIES

Researching your policies has two elements. A determination of what policies you need, and what your policies need to contain.

Determining the Policies You Need

In order to determine what policies you need, you need to conduct research in two areas: the legal framework (both legislative and common law) and within your organization. This will enable you to put together a handbook that fully achieves your organizations goals and objectives, as discussed above. The research is the most difficult and time consuming part of drafting the handbook. Once the research is done, writing the actual handbook takes very little time at all.

Legal Research

As mentioned above, your organization is subject to legislation, and that legislation may require you to communicate certain information to your employees or may put minimum standards on the policies that you develop to govern your employees. In order to draft your handbook, you will need to be familiar with the employment legislation (including both statutes and regulations, legislation passed pursuant to a statute that detail matters covered generally in the statute) that applies to your company. Many government departments and agencies are available to assist you to understand their legislation. For instance,

the Ontario Human Rights Commission has instruction guides available that list the essential elements of a harassment policy and can sometimes provide you with sample policies. The Canadian Centre for Occupational Health and Safety has extensive and easy to read information materials available on their web site (www.ccohs.ca). The Industrial Accident Prevention Association has as well many useful guides and publications, some available free, some at a minimal cost, and their representatives are usually willing to meet with you, provide you with sample policies, and even review those policies that you have drafted. The Employment Standards Branch of the Ontario Ministry of Labour provides information pamphlets that summarize important aspects of the Employment Standards Act. Another resource is books written by employment and labour law lawyers on various employment law topics. Often these books are written for human resources professionals, and the salient points of the law are summarized and explained in terms that are easy to understand and apply.

Your company's employment and labour law lawyer can assist you to identify the legislation and accompanying regulations that apply to your organization.

Corporate Research

It is essential that, when drafting your handbook, you understand your organizations needs. This can best be accomplished by seeking input from people at all levels of the organization. This type of inquiry will make a tremendous

difference to the usefulness of the finished handbook and its level of acceptance in the organization. Ask supervisors and managers what questions employees ask, and where confusion arises. Ask them what type of information, if given to employees, would be beneficial to them. Check with the appropriate persons to understand what corporate protections are required. Inquire with executives as to what challenges are facing the company and what information they need to get to employees. Ask employees what information they require or do not sufficiently understand. The survey methods can be formal or informal, oral or written. The method chosen should be the one that, in your organization, will ensure the most candid and thorough information exchange possible.

Determining What Information Your Policies Need to Contain

How much detail you include in your policies will depend upon where you have decided to focus, and what purposes you hope to achieve with your handbook. There may be areas that you touch on, but do not focus on, where only basic information is provided. Other areas that are important to the company will need to be explored in more detail.

While precedents are very helpful, and most human resources professionals are very generous with their time and resources, employee handbooks obtained from other companies should only be used as examples of what other companies have created to suit their situations. As stated above,

adopting policies of other companies is not recommended. That said, collect handbooks from as many similar organizations as you can - they can be very useful as guides and examples of what others have said and done. Remember, however, that handbooks can include information that is confidential and proprietary, and that permission should be obtained from the company whose handbook you wish to refer, and you should take the necessary steps to keep that information confidential.

If you decide to include information in your handbook on benefits provided by third parties, for instance group health benefits, you need to ensure that what you write is entirely consistent with the information provided by the third party insurer. If you misrepresent the contents of those policies to the employees, it is possible that the company could be liable for the difference between what the group insurer provides, and what the employer has promised in the handbook. The safest thing to do is to refer in your handbook to the group benefits guides provided by the insurer. If you want to include a summary of benefits, obtain your insurance carrier's approval of what you have written, and make sure that you keep both the information, and further approvals, up to date.

DO YOU NEED LEGAL ADVICE?

Yes, you do. There are, however, certain areas where legal advice is essential, and others where it is not required, but could be helpful.

It is essential that you have a lawyer review those sections of your handbook that are heavily legislated or where common law principles apply. These areas include such topics as discipline, termination and severance, non-competition and non-solicitation clauses, protection of intellectual property, confidentiality, ownership of corporate property, conflict of interest, privacy, email and Internet use, occupational health and safety, vacation, statutory holidays, and leaves. All policy decisions should ultimately be made by the company with legal advice, not by the lawyer, to ensure the organizations goals in drafting the handbook are met. Leaving the drafting to a lawyer may result in to legalistic a document, any may result in policies that represent legal minimums rather than policies that meet organizational needs.

A legal review of the handbook can also be useful to expose ambiguities and inconsistencies, strengthening the enforceability of the handbook. Lawyers also have the benefit of working with many different clients and a sometimes seemingly endless variety of situations which can offer an interesting perspective to the handbook. For instance, a lawyer who has advised a client seeking to recuperate the cost of expensive employee training from an employee who

resigned immediately after receiving the training may suggest a repayment clause be included in the manual to protect against such situations.

As well, a lawyer can look at the overall reasonableness of your policies and for evidence of systemic discrimination in your policies which you may not recognize.

For all of the time and effort invested in drafting a handbook, the cost of having it reviewed by a lawyer is very small, especially when it is compared to the cost of the unenforceable or illegality of one or more of its terms.

CORPORATE CULTURE AND PHILOSOPHY

Like people, companies grow and mature over time, and in doing so develop personalities, or cultures. This can be demonstrated by comparing two extremes, a mature company with a large and stable workforce with a young company with a small workforce. The mature, large company will have a highly developed internal structure including policies and procedures, written or not, formed over the years to manage the work and the workforce, and which have been integrated into the operations of the company. In developing its handbook this company will need to communicate a large quantity of detailed information to many employees, who may be spread out over more than one work site. Its goals may include continued stability and a well-informed, homogenous workforce that understands and espouses the corporate philosophies. A new, small company will likely have very few policies and procedures, developing them as they are required. As this company develops its product and finds its market, it needs to remain flexible. In drafting a handbook, its goal will be to communicate the information required by its employees while giving it and them the latitude to grow. Its handbook will need to prioritize the business needs of the company, allowing it to respond to market changes and workforce requirements quickly and efficiently, while at the same time provide sufficient guidance to employees to allow them to understand their place within the corporate strategy. While both

companies will have requirements for a handbook, and many of the subjects they include may be the same, the focus of the handbook, and the information contained within it, will be different. Of course most companies are not one extreme or the other, but somewhere in between. As well, different types of companies have different requirements, and one company may have several divisions that may each have varying requirements. A product manufacturing company, for example, may have the vast majority of its employees working on a production line at a plant. The employees may work in shifts, and may work in an environment where an accident could mean a very serious injury. Its employees will need basic employment and benefits information that may not be otherwise readily available to it, particularly if they don't work 9 to 5. Its handbook requirements, in terms of both its focus and its information requirements, will differ from a services company whose products are knowledge-based, who work in offices, who may travel frequently or work from various locations. Of course, the manufacturing company may also have different divisions, for instance a sales division, or an information technology division, whose requirements may be different from other divisions of the company.

The importance of creating a handbook that reflects the culture of the organization should not be underestimated this goal. Handbooks provide many valuable functions apart from the simple communication of information. They allow for the integration of new employees into the organization as quickly as

possible by increasing their understanding of the organization and their place within it, they are a resource to employees throughout their time with the organization, and they provide longer service employees with the information they need to remain content and productive. Sending the wrong message in a handbook can work against these corporate goals.

Handbooks can actually be used as a vehicle to promote culture changes within the workplace. The information contained about the company in the handbook will become the beliefs of the employees, and can drive corporate change.

LIVE BY THE SWORD; DIE BY THE SWORD

While there exists some uncertainty as to the contractual enforceability of employee handbooks, employers need to assume that the information that is placed in the handbook will be used against them and that any ambiguities contained in it will be interpreted in favour of employees.

The information in the handbook is a commitment by the employer to the employees and, when properly introduced, by the employees to the employer. It is very important, then, that policies in the handbook are clearly expressed, concise, and understandable, and that all employees be ware of their handbook's contents.

From a drafting standpoint, an employer should not make commitment it cannot, or may later not want to, keep. Be realistic. Retain discretion where necessary. Establish conditions where required. As much as possible, explain how and when discretion will be exercised and set out the applicable conditions. Flexibility is important from both the employers and the employees perspective.

Lastly, expect that the implementation of your handbook will require training within your organization. Staff must be knowledgeable and be able to carry out the policies in a consistent manner.

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