

Employee Handbook Revisions: Required & Recommended

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Housekeeping



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TOPICS INCLUDE:

- Avoiding inadvertent legal contract issues
- Legal compliance requirements for specific policy inclusion by state and number of employees
- Trending HR Best Practices
- New handbook considerations from the Biden administration
- Need for companies to review policies
- Consistent application of all policies to avoid new precedent
- The mechanics of communication, how to distribute, sign off on the acknowledgement, legal signature
- Sample acknowledgement and sample master list of what should be included/considered

Why Handbooks Are So Important

The employee handbook:

- communicates basic policies and procedures,
- is a direct mechanism for insuring that employees have been notified of the essential information relative to their employment, and
- provides clarity with regards to how management should be implementing policies consistently




**What do the
dictionary and
employee
handbooks
have in common?**

**No one has ever
sat down and
read the entire
book from front
to back.**

Why Handbooks Are So Important

- To protect against claims of misunderstanding, inconsistency in application, and/or oral promises.
- However, a handbook can easily become a liability when the handbook is poorly drafted or ineffectively implemented.



**What do the
dictionary and
employee
handbooks
have in common?**

**Most people
will only refer
to it when they
need it.**

Top Mistakes in an Employee Handbook



Top Mistakes in an Employee Handbook

1. Not having one at all
2. Inadvertently creating contractual rights to employment
3. Failing to include a disclaimer of contract
4. Ineffectively communicating the employee handbook provisions
5. Failing to obtain employee acknowledgement
6. Confusing policy manuals with employee handbooks
7. Using form handbooks
8. Failing to regularly update
9. Not consistently applying policies
10. Being too specific
11. Including an introductory or probationary period

Top Mistakes in an Employee Handbook

1. Not having one at all

- Employee handbooks are the employer's greatest opportunity to communicate its expectations and practices to employees.
- Handbooks protect the employer from employment practices legal claims.
- If well drafted, especially the disciplinary section and the at-will acknowledgement, your handbook will be a solid affirmative defense to employment claims.

Top Mistakes in an Employee Handbook

1. Not having one at all (cont.)

- Employers who choose not to use one risk creating confusion about their internal policies and, more importantly, developing inconsistent practices with respect to a number of critical issues, including discipline and employee benefits.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment

- In many states, including Minnesota, the employment relationship is “At-Will.” The concept of at-will permits the termination of an employee for any lawful reason with or without notice.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- However, the at-will presumption can be altered by a poorly drafted handbook which guarantees employees certain rights; intentionally or unintentionally.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- For example, employers may give employees contractual rights to employment when a policy states that an employee can only be terminated for “just cause” or when a policy guarantees certain disciplinary procedures prior to termination, such as a graduated discipline policy.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- “Realizing the importance of job security to all of us, we will work continuously for the benefit of our employees and the company, and to improve the competitive position of our firm in the service our present and prospective clients. **This will enable us to provide jobs and security for our team members.**”

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- In the classic case of *Pine River*, the court found that the text of the Pine River State Bank discipline policy created a contract between the employer and the employee.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- “In the interest of fairness to all employees the company establishes reasonable standards of conduct for all employees to follow in their employment at Pine River State Bank. These standards are not meant to place unreasonable restrictions on you but are considered necessary for us to conduct our business in an orderly and efficient manner.”

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- The policy then proceeds to outline a procedure to be utilized in the event of a violation of company policy including an oral reprimand, a written reprimand, a written reprimand and a meeting with the executive vice president and possible suspension, and discharge.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- Finally, the policy read, “in no instance will a person be discharged from employment without a review of the facts by the executive officer.”

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- What is important to note about the policy is the fact that it makes definitive promises to the employee as to how discipline will be initiated (a step process) and guarantees a review by the executive officer prior to discharge.

Top Mistakes in an Employee Handbook

2. Inadvertently creating contractual rights to employment (cont.)

- The court found the language specific enough to induce a contract between the parties, ultimately resulting in Pine River State Bank being liable for wrongful termination.
- This cost Pine River State Bank 1.6 million dollars.

Top Mistakes in an Employee Handbook

3. Failing to include a disclaimer of contract

- Every employee handbook should have a disclaimer specifying that the handbook is not a contract of employment, nor are the terms of the disclaimer meant to imply a contract. The inclusion of this provision can protect an employer from claims of termination and breach of contract suits.

Top Mistakes in an Employee Handbook

3. Failing to include a disclaimer of contract (cont.)

- The disclaimer should be prominently displayed on a separate page exclusive of the introduction.

Top Mistakes in an Employee Handbook

3. Failing to include a disclaimer of contract (cont.)

- *No provision in this handbook is intended to create a contract between the company and any employee or limit the rights of the company and its employees to terminate the employment relationship at any time, with or without cause. This handbook is intended to be a general statement of policy, to be modified and applied by the company at its discretion.*

Top Mistakes in an Employee Handbook

4. Ineffectively communicating the employee handbook provisions

- The terms of an employee handbook, of course, are only effective when the employer can prove that they were adequately communicated to the employee.

Top Mistakes in an Employee Handbook

4. Ineffectively communicating the employee handbook provisions (cont.)

- Never assume that the employee will take the handbook home and read through the provisions on their own or that they will check the handbook periodically for updates. Upon implementation, the employer should schedule a meeting with employees to discuss the contents and answer any questions they may have.

Top Mistakes in an Employee Handbook

- 4. Ineffectively communicating the employee handbook provisions (cont.)**
 - Similarly, the employer should incorporate a review of the employee handbook into orientation procedures.

Top Mistakes in an Employee Handbook

5. Failing to obtain employee acknowledgement

- Handbook acknowledgements are necessary in order to ensure that all employees have read, understood and are prepared to comply with company policies.

Top Mistakes in an Employee Handbook

5. Failing to obtain employee acknowledgement (cont.)

- The acknowledgement form should restate that the employment is at-will and that the employer retains the right in its sole discretion to modify, alter or amend the handbook at any time.
- Once signed, the acknowledgement form should be placed in the employee's personnel file.

Top Mistakes in an Employee Handbook

5. Failing to obtain employee acknowledgement (cont.)

- The acknowledgement form should not only include a signature and date line but include information as to what version of the policy they are signing. *For example, is the employee signing the handbook approved and distributed on January 1, 2019 or January 1, 2020?* Save yourself the requirement of having to store a copy of the employee handbook in every personnel file by including this form in the acknowledgement form.

Top Mistakes in an Employee Handbook

6. Confusing policy manuals with employee handbooks

- Employee handbooks are not meant to replace policy and procedure manuals. Manuals are meant to provide a step-by-step guide for procedures needed to run the business while employee handbooks are meant to provide employment guidelines to everyone on employment-related concerns.

Top Mistakes in an Employee Handbook

6. Confusing policy manuals with employee handbooks (cont.)

- For example, a step-by-step guide on ringing up a customer should never appear in an employee handbook; Rather, it should be in a training manual.

Top Mistakes in an Employee Handbook

6. **Confusing policy manuals with employee handbooks** (cont.)

- Limit the information contained within the handbook to general information related to the employment of all individuals rather than the internal policies and procedures of business operations.

Top Mistakes in an Employee Handbook

7. Using form handbooks

- A handbook that is not tailored to the specific employer is, in some ways, a greater liability, than a benefit. Borrowing a handbook from another business, from the Web, or from a blog without tailoring it specifically to your business can be a risky and costly adventure.

Top Mistakes in an Employee Handbook

7. Using form handbooks (cont.)

- When developing a handbook, the employer should consider:
 - 1) the size of the business
 - 2) the nature of the business
 - 3) the number of locations
 - 4) whether they are public or private employer
 - 5) whether they separate classification of union and non-union employees

Top Mistakes in an Employee Handbook

7. Using form handbooks (cont.)

- By using a form handbook, the employer risks creating policies that are inconsistent with practice and that do not reflect local rules and regulations. Failure to take into consideration state-specific laws can put a company at risk as they often provide greater protections for the employee than Federal legislation.

Top Mistakes in an Employee Handbook

7. Using form handbooks (cont.)

- For example, Minnesota includes public assistance status as a protective class for purposes of applying the Minnesota Human Rights Act. Wisconsin and other states do not have such a similar requirement.

Top Mistakes in an Employee Handbook

7. Using form handbooks (cont.)

- The general rule: “don’t do it.” It may seem easier, cheaper and less arduous but in the long run, it will always be harder, more expensive, and a great deal more painful to be sued and proceed through litigation because of a poorly drafted employee handbook.

Top Mistakes in an Employee Handbook

8. Failing to regularly update

- An employee handbook should be considered a living document, not a stagnant grouping of paper collecting dust never to be updated.

Top Mistakes in an Employee Handbook

8. Failing to regularly update (cont.)

- Employee handbooks that are out of date and are no longer consistent with law or practice are useless and, more importantly, open up the business to risk and liability.

Top Mistakes in an Employee Handbook

8. Failing to regularly update (cont.)

- Regularly updating the employee handbook will help ensure that it remains compliant with applicable laws and is still meeting the needs of the business. We recommend that it be updated every twelve months.

Top Mistakes in an Employee Handbook

9. Not consistently applying policies

- Employee handbook provisions are meant to ensure everyone understands their obligations, duties, and benefits and is also meant to ensure that everyone is treated accurately and consistently.

Top Mistakes in an Employee Handbook

9. **Not consistently applying policies** (cont.)

- By failing to consistently implement the terms of the handbook, the employer risks the possibility of a lawsuit.

Top Mistakes in an Employee Handbook

9. **Not consistently applying policies** (cont.)

- Example: the employee handbook includes a tardiness policy whereby two late arrivals within a period of three months is grounds for discipline. Jack arrives late every Monday after a Vikings game but is never spoken to about it. Jill arrives late twice in one month because her daughter refuses to change out of her pajamas in the morning, resulting in a tug of war between them. She is given a verbal warning, and on her third late arrival, a consequence of a spilled milk incident on her new suit, she is terminated.

Top Mistakes in an Employee Handbook

10. Being too specific

- Detailed statements of policy and procedure create the illusion of a contract between the parties – the absolute opposite of what the employer wants.

Top Mistakes in an Employee Handbook

10. Being too specific (cont.)

- Avoid exhaustive lists, especially those that limit the employer's ability to extend beyond what is listed by failing to include a statement that the list is only intended to provide examples and is under no circumstances intended to be exhaustive.

Top Mistakes in an Employee Handbook

10. Being too specific (cont.)

- Example: a leave of absence should be granted only in circumstances of extreme illness.
- Example: to be valid, a leave of absence request must be in writing and submitted two weeks prior to the leave request.

Top Mistakes in an Employee Handbook

11. Including an introductory or probationary period

- The use of an introductory or probationary period can often mislead the employee to believe that they cannot be terminated during that time frame – a virtual guarantee of employment.

Top Mistakes in an Employee Handbook

11. Including an introductory or probationary period (cont.)

- Although it is recommended that employers eliminate all references to a probationary period, there appears to be a desire to remain married to this provision.

Top Mistakes in an Employee Handbook

11. Including an introductory or probationary period

- If you cannot persuade your employer to eliminate the probationary period then, at a minimum, detail exactly what is expected during the probationary period and include specific language that the employee remains employed “at-will” during this time and can be terminated without cause at any time during the probationary period or after for any reason, without further review.

Recap - Why You Need a Handbook

- Creates an affirmative defense to an employment practice liability
- Provides employees a roadmap of conduct to follow – tell them how to behave – don't assume they will get it right
- Avoids the extreme danger of an oral promise/contract claim and allows you to be sure you are an at-will employer

More Mistakes in an Employee Handbook

- Failing to identify those individuals who should be responsible for implementing the policy and/or policies
- Ombudsman for responding to harassment claims
- Neglecting to detail procedures for reporting and addressing harassment
- Inconsistency within the handbook or with other documents
- Overtime restrictions
- Policies restricting an employee's ability to discuss wages and other employee topics with other employees
- Open door policy

Social Networking

- Every handbook should include a social networking policy
- Mostly employers haven't gotten around to doing this yet – NOW IS THE TIME
- The policy draws a line in the sand
- The policy mitigates risk of inappropriate disclosure
- The policy makes clear there is no expectation of privacy
- The policy specifies which web activities are acceptable and which ones are not
- Do not leave it up to the judgment of your employees

Data Security Policy

- Should Not be *in* the Handbook
- Should be *Referenced* In Summary Form in the Handbook
- Separate Acknowledgement

Required Policies Based on Headcount

- Legally required policies to include:

Required Policy	Number of Employees
Personnel File Access	All MN Employers
Wage Disclosure Notice	
Family and Medical Leave Act (FMLA)	50 or more
MN Pregnancy and Parental Leave Act	21 or more
COBRA Rights	20 or more
Americans with Disabilities Act and Amendments (ADAAA)	15 or more

Items typically included in an Employee Handbook



Items Typically in an Employee Handbook

Below is a sample outline, or Table of Contents, for items that are typically included in an employee handbook.

Also included should be the additional disclaimer that the employer has the right to change the rules without notice, that employment is at will (where allowed) and that the handbook does not create a contract.

Items Typically in an Employee Handbook

- 1. Welcome Message to New Employees and Recognition of Current Employees**
 - a. Company Mission Statement
 - b. Equal Opportunity Statement
 - c. Contractual Disclaimer and At-Will Statement
 - d. Purpose of the Employee Handbook
 - e. Background Information on the Company
 - f. Orientation

Items Typically in an Employee Handbook

2. Policies and Procedures

- a. Americans with Disabilities Act
- b. Personal Safety
- c. Sexual Harassment
- d. Drug and Alcohol
- e. Violence and Weapons
- f. Attendance
- g. Hours of Work
- h. Meal and Rest Periods
- i. Overtime
- j. Timekeeping

Items Typically in an Employee Handbook

2. Policies and Procedures (cont.)

k. Personnel Records

l. Paydays

m. Payroll Deductions

n. Garnishments

o. Performance Reviews

p. Promotions

q. Transfers

r. Termination: Reduction in Force, Layoff/Recall

s. Bulletin Boards

t. Telephone/Email/Internet Use

u. Social Media

Items Typically in an Employee Handbook

3. Benefits

- a. Holidays
- b. Vacation
- c. Sick Leave
- d. Disability Leave
- e. Personal Leave
- f. Bereavement Leave
- g. Family and Medical Leave
- h. Jury Duty
- i. Military Leave
- j. Paid Time Off

Items Typically in an Employee Handbook

3. Benefits (cont.)

k. Health Insurance

l. Life Insurance

m. Retirement and Pension
Plans

n. Call-In/Report-In Pay

o. Training

p. Educational Assistance
Program

q. Service Awards

r. Workers' Compensation

s. Unemployment Insurance

Items Typically in an Employee Handbook

4. Employee and Employer Responsibility for Safety

- a. Commitment of the Company
- b. Emergency Procedures
- c. Medical Services
- d. Personal Protective Equipment
- e. OSHA Requirements: Safety Rules, Reporting Accidents

Items Typically in an Employee Handbook

5. Procedures

- a. Standards of Conduct
- b. Progressive Discipline
- c. Exit Process

Items Typically in an Employee Handbook

6. Summary and Acknowledgment

- a. The Importance of the Policies and Procedures
- b. Acknowledgment of Receipt

Policy & Procedure

- A good employee handbook must include information about employee rights, legal compliance, and how to file complaints and inquiries.
- The handbook must include company policies, procedures, and rules.
- Issuing the Handbook is important. Verifying everyone has read and understood it is critical.
- An employee handbook acknowledgment form confirms that staff members have not only been issued the handbook but comprehend its terms. That's critical for all businesses, large and small.

How does an acknowledgment form protect business?

- It outlines rules and performance expectations employees must follow.
- It warns what will happen if rules are violated or if performance issues occur.
- In the event an employee files a claim or sues the company, a signed Acknowledgement Form verifies the staff member knew the rules and expectations, along with the consequences of violation.

A SIGNED ACKNOWLEDGMENT FORM CAN INSULATE A COMPANY FROM LIABILITY FOR CERTAIN INFRACTIONS

How does an acknowledgment form protect business?

- A strong policy prohibiting sexual harassment in the workplace, for example, should be outlined in your handbook. If a staff member violates the policy, behaving inappropriately, the policy, and any disciplinary action it provides and was imposed, may shield the company from liability in the event of a claim or lawsuit.
- No employee should be surprised they're being fired. They should know it's coming and have had an opportunity to correct performance and behavior. The Handbook outlines what infractions could lead to progressive disciplinary action and which may be grounds for immediate dismissal.
- When it comes to infractions, initiating progressive discipline may prompt a problem employee to start looking for another job: easily accomplished in today's tight applicant market. That can be the difference between a contentious (potentially volatile) termination meeting and an exit interview that wishes them well on their career path. Without acknowledgment that they knew the rules and ramifications, however, you could be arguing policy as well as performance as you attempt to correct behavior or sever the employment arrangement.

How do you handle an employee who refuses to sign the form?

- Consider whether signing the acknowledgment should be a condition of employment. Unless there is a legitimate reason not to sign, acknowledgment should generally be mandatory.
- If an employee refuses to sign and separation is not possible (as with workers under a collective bargaining agreement), businesses do have other options.
 - Option 1: An HR representative can note on the form that the employee refused to sign but was issued a copy of the handbook and notified all policies in the handbook apply regardless of their refusal to sign.
 - Option 2: Have two staff members, one from Human Resources and a manager from the employee's department, go over the contents of the Handbook with the staff member, answering any questions about rules and policies. At the end of the meeting, both will note on the employee's acknowledgment page the staff member refused to sign. They should also include the date, time, names and signatures of those who discussed the handbook and its contents directly with the employee.
- All employees should be notified of the terms and conditions in the handbook apply to every staff member, with or without their signature. Remember to include all signed (or unsigned) forms in the employee's personnel file. An employee handbook acknowledgment form is an important tool for businesses and employees. Make sure yours is current and your employees understand what it holds.

Sample Employee Acknowledgement Form

ABC Company

Employee Acknowledgment Form

I acknowledge that I have received a copy of the ABC Company Employee Handbook. It is my responsibility to read and familiarize myself with the handbook. I agree that if there is any information in this Employee Handbook that I do not understand, I will seek clarification from Human Resources.

I understand that ABC Company is an "at will" employer and that either ABC Company or the employee can terminate the employment relationship at any time, with or without cause. It also is understood that neither party has an obligation to base a decision to terminate the employment relationship on any reason other than the decision not to continue the relationship. It is further understood that nothing contained in this Handbook is intended to create nor shall be construed as creating a contract of employment, express or implied, or a guarantee of employment for a definite or indefinite term.

In addition, I understand that this Employee Handbook states ABC Company's policies, practices and procedure in effect on the date of publication. I understand that nothing contained in this Employee Handbook may be construed as creating a promise of future benefits or a binding contract with ABC Company for benefits or for any other purpose. I also understand that these policies, practices and procedures are continually evaluated and may be amended, modified or rescinded at any time. My signature on this page serves as an acknowledgement of my responsibility to keep this Employee Handbook current as changes are issued, as well as an acknowledgement that I have received all Company policies that may affect me in compliance with the Minnesota Wage Theft Act. These policies include the ones I have received that are separate from the Company Handbook (e.g. _____[SPECIFY POLICIES]_____).

Please sign and date this receipt and return it to Human Resources.

Print Name _____

Signature _____

Date _____



Handbook Communication and Distribution

- Once the vendor returns finished copies of the handbooks, the organization must establish a method for distribution, such as during new-hire orientation or as a manual distribution to employees.
- Some employers use their intranet or internal email to post the handbook electronically; however, physical copies need to be made available to employees without access to the Internet or on request of an employee. Posting the employee handbook on the company intranet or via email is also useful when changes to policies are made and need to be communicated to employees.

Trending Best Practices



Trending Best Practices

Employers should scan the work environment for common practices that are currently in place; if there are no policies, they should be developed. Once the employer has updated the policies and formalized the common practices, legal counsel should review them, and HR should use these final policies for developing the employee handbook.

Trending Best Practices

Employers should also consider the National Labor Relations Board (NLRB) rulings and guidance. On March 18, 2015, the NLRB's General Counsel provided guidance pertaining to employee handbooks. Employers should be mindful of avoiding overbroad confidentiality rules in handbooks that would prevent employees from discussing wages and other terms and conditions of employment (i.e., protected concerted activities). For example, it would be unlawful to state "do not discuss outside of work customer or employee information, including phone numbers and addresses." Instead, a handbook could state, "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Company Name] is cause for disciplinary action, including termination."

Trending Best Practices

Conduct rules can also be overbroad. For example, it could be unlawful to state in a handbook to "be respectful of others and the company." Such a statement could be construed by employees as placing restrictions on criticism toward the company (e.g., its working conditions), which is a protected concerted activity. On the other hand, a handbook could state, "Being insubordinate, threatening, intimidating, or disrespectful or assaulting a manager, supervisor, co-worker, customer or vendor will result in discipline." The NLRB has similarly addressed social media policies, creating a delicate balance for employers between protecting an organization's reputation while not impeding on an employee's protected right to concerted activities.

Employee Handbook Policies that may need revision under the Biden Administration



Employee Handbook Policies that may need revision under the Biden Administration

How does a presidential election impact a company's employee handbook?

The link between the White House and an employee handbook is more direct than one might imagine: First, the National Labor Relations Act (NLRA or Act) regulates employee handbooks; second, the National Labor Relations Board (NLRB or Board) interprets the Act; and third, Board members are appointed by the President.

Employee Handbook Policies that may need revision under the Biden Administration

Even though the NLRA and the rights it protects have existed since 1935, the interpretation of that law changes with each new presidential administration. As Board members appointed by a Republican president tend to be more employer-oriented and Board members appointed by a Democratic president tend to be more union-oriented, a change in the White House can bring changes to how the NLRB evaluates a company's employee handbook.

Employee Handbook Policies that may need revision under the Biden Administration

Because the law staggers the Board members' terms, it is expected that Democratic appointees will hold a majority on the Board sometime after Labor Day 2021. Most recently, President Biden nominated Gwynne Wilcox, a union-side labor attorney, to fill a vacant seat on the Board. The President will have another opportunity to fill a seat with a Democratic appointee in September, when the term of one of the three Republican-appointed members expires.

Employee Handbook Policies that may need revision under the Biden Administration

For private sector employers, the NLRA regulates employee handbooks because it both governs relations between employers and their union employees and it ensures that employers aren't acting in a manner that chills or otherwise unlawfully suppresses an employee's federal right to act together with other employees for their mutual aid and protection. In other words, the NLRA protects non-union employees who act together with respect to their terms and conditions of employment, whether or not they do so with a union. Employee policies that interfere with that right violate the Act.

Employee Handbook Policies that may need revision under the Biden Administration

So, the upcoming shift in control likely will shift how the Board views facially neutral handbook policies—which do not explicitly prevent employees from engaging in protected activity but could violate the Act if they “would reasonably tend to chill employees in the exercise of their Section 7 rights.” The NLRB currently evaluates these policies using the standard set forth in *Boeing*, a 2017 Republican-era NLRB decision. The *Boeing* standard balances the workers’ rights under the NLRA against the employers’ legitimate justifications for regulating conduct in the workplace.

Employee Handbook Policies that may need revision under the Biden Administration

This standard has allowed employers more flexibility in drafting policies. Prior to Boeing, the NLRB used the more stringent *Lutheran Heritage* standard, which found neutral policies unlawful if employees would reasonably construe the policy's language to prohibit protected concerted activity; it's expected that the *Lutheran Heritage* standard (or a similarly restrictive standard) will return once the NLRB returns to a Democratic majority later this year.

Employee Handbook Policies that may need revision under the Biden Administration

As this shift in control unfolds, employers may want to evaluate their current policies under the *Lutheran Heritage* standard. The following are types of policies—and general principles for revising those policies—to consider. Much of this guidance comes from information disseminated by the NLRB’s General Counsel shortly after the Board adopted the *Lutheran Heritage* standard:

Employee Handbook Policies that may need revision under the Biden Administration

Workplace conduct: Policies regarding workplace conduct are likely to be found unlawful if they restrict employees from criticizing the employer’s labor practices and working conditions or if they restrict protected discussions with co-workers. For example, policies that generally ban “offensive” comments or “inappropriate” discussions will typically be deemed unlawful. While employers may generally prohibit insubordination, employers should be cautious when prohibiting particular conduct that does not amount to insubordination. Policies that merely require employees to be respectful to clients, customers and competitors (rather than the employer) or cooperative with co-workers and the employer are more likely to be found lawful.

Employee Handbook Policies that may need revision under the Biden Administration

Media contact: As noted by the General Counsel, employees enjoy the right to communicate with third parties, including the media, regarding wages, benefits and other terms and conditions of employment. Policies regarding employee media contact are more likely to be found lawful if they make clear that they restrict employees from speaking “on behalf of the employer,” rather than restricting the employees from speaking to outsiders on their own behalf or on behalf of other employees.

Employee Handbook Policies that may need revision under the Biden Administration

Confidentiality: Policies that restrict disclosure of employee information, or terms and conditions of employment, are likely to be found unlawful. Specifically, policies with bans on disclosing information, where “information” reasonably includes employee information or personnel information, will likely be deemed unlawful. Instead, these policies should more narrowly define confidential information in prohibiting its disclosure and should not reference information regarding employees or anything that would reasonably be considered a term or condition of employment.

Employee Handbook Policies that may need revision under the Biden Administration

Conflict-of-interest: A conflict of interest may arise where, for example, an employee holds ownership interest in a competitor of the employer or maintains a board position with a client of the employer. This is problematic because an employee's personal interest may differ from the employer's own interest in a way that could hurt the employer's business due to the opposing interests. Employers may draft these policies to require disclosure of potential conflicts or prevent such actions in order to avoid even the appearance of a conflict.

Employee Handbook Policies that may need revision under the Biden Administration

Conflict-of-interest (cont.): However, these policies are likely to be unlawful where they serve to prohibit employee participation in concerted activity to improve their terms and conditions of employment, such as where a policy broadly prohibits any action that is not in the employer's best interest. To avoid language that could be reasonably construed to prohibit such activities, conflict-of-interest policies should include context and examples or otherwise clarify that a prohibition is limited to legitimate business interests.

Employee Handbook Policies that may need revision under the Biden Administration

Use of intellectual property: Employees may engage in fair protected use of the employer's intellectual property. Therefore, policies with broad bans on employees' noncommercial use of the employer's logos, copyrights and trademarks that would prohibit their fair use in the course of protected concerted activity are likely to be found unlawful. However, policies that simply require employees to respect laws permitting fair use will typically be found lawful.

Employee Handbook Policies that may need revision under the Biden Administration

Photography and recording: Policies that contain total bans on photography and recording will typically be found overbroad and unlawful because they would prevent employees from documenting unfair trade practices and from taking pictures or recordings on non-work time. Policies instead should be narrowly tailored to address specific issues or circumstances, such as if the policy is created in response to a breach of patient privacy.

Employee Handbook Policies that may need revision under the Biden Administration

Leaving work: Policies may not be drafted in a way that would reasonably be construed to disallow employees from going on strike or participating in a walkout. These policies are thus likely to be found lawful so long as they do not reference “strikes,” “walkouts,” “disruptions” or the like.

Employee Handbook Policies that may need revision under the Biden Administration

Employers may want to begin reviewing their employee policies to ensure that they would be deemed lawful under the *Lutheran Heritage* or similar standard, paying particular attention to the types of policies described above. Employers may also wish to consult with competent legal counsel about how to revise these policies in light of the changes to come.

What Won't Change under the Biden Administration



What won't change under the Biden Administration

Many priorities at the enforcement agencies led by President Joe Biden will remain the same as under the direction of Former President Donald Trump, at least initially.

"Changes tend to come pretty slow" in the federal government, said Paul Patten, an attorney with Jackson Lewis in Chicago.

What won't change under the Biden Administration

EEOC

In light of the Equal Employment Opportunity Commission's (EEOC's) current 2018-2022 strategic enforcement plan (SEP) remaining in place and a continuing Republican majority on the commission until the middle of 2022, "the EEOC's focus—at least in the short term—is not likely to change greatly," said Randy Coffey, an attorney with Fisher Phillips in Kansas City, Mo.



What won't change under the Biden Administration

EEOC

"The existing SEP and the makeup of the commission suggest that a wholesale shift in direction would be very difficult," he said. "As a result, the EEOC most probably will continue to direct its efforts on 'strategic-impact' cases within the scope of the SEP—cases that make a difference in the law or ones that generally call to employers' attention issues that violate the law and areas that create significant risk to employers."

What won't change under the Biden Administration

EEOC

The prevention of harassment, which is a priority area in the SEP, is sure to be a continued area of EEOC enforcement, particularly as the agency brings cases when an employer has ignored harassment complaints or has many harassment claims, Coffey noted.

"The EEOC also is likely to retain a strong interest in disability discrimination claims and related reasonable accommodation issues," he said.

Expect the EEOC's enforcement to remain about 80 percent to 90 percent unchanged, Patten said.

What won't change under the Biden Administration

OSHA

While employers may perceive significant policy shifts between administrations, "enforcement officials at the Occupational Safety and Health Administration (OSHA) know that most of the agency chugs on as it normally does," according to Courtney Malveaux, an attorney with Jackson Lewis in Richmond, Va., and Melanie Paul, an attorney with Jackson Lewis in Atlanta, in a joint email.

What won't change under the Biden Administration

OSHA

"One thing that changes only glacially, if at all, is the most frequently cited items," they said, which is a report on the violations OSHA found most often over the year. "The culprits may shift a spot or two in a given year, but they don't change much."

What won't change under the Biden Administration

OSHA

"Since the onset of the pandemic, OSHA has reported an uptick in its use of its standards relating to COVID-19, including respiratory protection, recording and reporting occupational injuries and illnesses, personal protective equipment and the general duty clause, [which is] the catchall for any hazards not identified in existing OSHA standards. So those categories may move up on the list," Malveaux and Paul continued. "But that should prove to be a temporary blip once enforcement officers increasingly return to field inspections as the pandemic wanes."

What won't change under the Biden Administration

WAGE and HOUR DIVISION

"While there will certainly be changes in how the Wage and Hour Division interprets the law and an increased focus on enforcement, the core functions of the Wage and Hour Division will remain the same: investigating and litigating, where necessary, violations of the Fair Labor Standards Act (FLSA)," said Jeffrey Brecher, an attorney with Jackson Lewis in Long Island, New York.

What won't change under the Biden Administration

WAGE and HOUR DIVISION

"Under the new administration, it is unlikely that DOL [Department of Labor] investigations will change," said Hagood Tighe, an attorney with Fisher Phillips in Columbia, S.C. "The department's investigators are career—not political—employees, and their processes did not change when Trump was elected. Therefore, I don't anticipate any difference under Biden."

What won't change under the Biden Administration

WAGE and HOUR DIVISION

"The substantive area that I think would be least likely to change would be the division's interpretations of the Family and Medical Leave Act," said Robin Shea, an attorney with Constangy, Brooks, Smith & Prophete in Winston-Salem, N.C. "The most recent regulations were issued in 2013, during the Obama administration, so they are probably consistent with any positions the Biden administration would take."

What won't change under the Biden Administration

OFCCP

The Office of Federal Contract Compliance Programs (OFCCP) leadership will likely shift its approach on audits "to one more similar to that of [former OFCCP director] Pat Shiu under the Obama administration. Federal contractors should be prepared for a return to the 'no stone goes unturned' approach to audits," said Meredith Gregston, an attorney with Duane Morris in Austin, Texas.

Cheryl Behymer, an attorney with Fisher Phillips in Columbia, S.C., said she anticipated that the OFCCP's focus on compensation disparities is likely to continue in the Biden administration.

What won't change under the Biden Administration

NLRB

As for the National Labor Relations Board (NLRB), "At least until August of 2021, not much will change," said Rick Grimaldi, an attorney with Fisher Phillips in Philadelphia.

Three of the four seated members of the NLRB are Republican. "President Biden will be able to move to fill the one vacant seat immediately," said Eve Klein, an attorney with Duane Morris in New York City. "However, he will have to wait until at least Aug. 27, 2021, when member William Emanuel's seat expires, to add a second Democratic appointee to attain majority control of the board."

What won't change under the Biden Administration

NLRB

Republican General Counsel Peter Robb's term does not expire until Nov. 17, 2021. "This is significant, as the general counsel makes decisions as to which case to prosecute," Klein said.

Grimaldi predicted the Biden administration eventually will be "one of the most pro-labor administrations in recent memory."

But Daniel Schudroff, an attorney with Jackson Lewis in New York City, said, "There won't be immediate change" with the NLRB, despite many people's expectation for changes overnight.

What won't change under the Biden Administration

Possible Changes

That said, some significant changes are possible, according to Jonathan Segal, an attorney with Duane Morris in Philadelphia. Among these, he predicted the Biden administration will seek:

- An OSHA COVID-19 standard.
- Approval for publication of the EEOC's updated guidance on harassment.
- An increase in the minimum wage for nonexempt employees.
- An increase in the minimum salary for employees to be exempt under the FLSA.



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