

Employee Handbooks

REVISING POLICIES TO PROTECT EMPLOYER
INTERESTS AND MINIMIZE LIABILITY

May 22, 2013



Presented by:

Reinhart
Attorneys at Law

Katie D. Triska is an attorney in the firm's Labor and Employment and International Practices. She routinely advises employers on a wide range of employment issues, including successful hiring, employee performance management and termination strategies; development and implementation of anti-harassment and other personnel policies; evaluating reasonable accommodation obligations under the Americans with Disabilities Act (ADA) and state disability laws; and achieving compliance with the Family and Medical Leave Act (FMLA) and state leave laws.



Katie represents employers in litigation before state and federal courts and agencies. She effectively and efficiently defends claims of race, age, religion, national origin, disability, discrimination, harassment, retaliatory discharge, breach of contract, defamation, negligence, wrongful termination, violation of ADA and FMLA laws, and wage and hour issues.

Katie also provides clients ongoing counseling and training designed to minimize the risk of litigation and maximize employee retention and productivity.

AGENDA

- 8:00 am Networking for in-person attendees
 Webinar attendees begin to log on
- 8:15 am Presentation by Katie Triska
- 8:45 am Questions and Answers

Asking Questions

Throughout the webinar, type your questions using the "send note" button at the top of the screen. Using the drop down box, send your note to **REINHART BOERNER VAN DEUREN**. We will answer as many questions as possible during our Q & A session at the end of the webinar.

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Webinar Housekeeping

Viewing the Slides

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Handouts

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Information

This webinar provides general information about legal issues. It should not be construed as legal advice or a legal opinion. Attendees should seek legal counsel concerning specific factual situations confronting them.

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Employee Handbooks: Revising Policies to Protect Employer Interests and Minimize Liability

Katie D. Triska

May 22, 2013

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Partnering for your Success

Overview

- GINA
- ADA
- FMLA
- Nursing Mothers
- Deductions
- Vacation
- Dress Code
- Overtime
- Safe Harbor
- Anti-Harassment
- Drug Testing
- Confidentiality
- NLRA

Genetic Information Nondiscrimination Act ("GINA")

- Update EEO/nondiscrimination and harassment policies to include "genetic information" as a protected class
- "Genetic information" is defined very broadly to include any family medical information, not just hereditary information
 - Example: "What kind of cancer did your grandma have?" "She had lung cancer."

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GINA (cont.)

- Requests for an employee's medical information must include GINA safe harbor language
 - The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

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ADA Issues

- Leave of absence policy
 - Do not include a maximum length of leave
- Sick leave policy
 - Exclude ADA absences from disciplinary process

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ADA Issues (cont.)

- Accommodation process
 - Create "Disabilities" policy:
 - Employer will comply with its state and federal obligations under disabilities law; and
 - Instruct employees how to request an accommodation

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FMLA

- FMLA-covered employers who issue handbooks must include the DOL's Employee Rights and Responsibilities Form: <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>
 - Employer can duplicate the text into its FMLA policy, or reference the form in its FMLA policy and attach it to the back of its handbook

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FMLA (cont.)

- Changes to military-related leave in final rule
 - Qualifying exigency leave to care for *parent* of a service member
 - The amount of leave a family member may take to spend time with the service member on rest and recuperation leave increased from 5 days to 15 days

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FMLA (cont.)

- The final rule also provides that eligible employees may take leave to care for a covered *veteran* with a serious injury or illness
- "Serious injury or illness" includes injuries and illnesses that existed before the service member's active duty and were aggravated during active duty
- Policies need to be revised to reflect these changes

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Nursing Mother Breaks

- Policy should:
 - Affirm that employer will grant nursing mothers breaks to express milk
 - Identify the location of the private area for milk expression (if possible)
 - Describe process to request these breaks

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Deductions From Pay

- Employer should not state that it will make deductions from an employee's pay for faulty workmanship or for lost, stolen or damaged equipment or property
- There are only three circumstances in which such deductions are permissible:

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Deductions From Pay (cont.)

- With the employee's written permission at the time the deduction is made;
- The employer and the employee's representative determine that the employee is responsible for the loss due to the employee's negligence, carelessness, or willful and intentional conduct; or
- The employee is found guilty or held liable by a court due to the employee's negligent, careless, or willful and intentional conduct

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Vacation Payout

- Policy should explain what happens with unused accrued vacation time upon separation of employment
- Consider whether unused vacation time will be paid out in the following circumstances:
 - Termination without cause
 - Termination with cause
 - Resignation with notice
 - Resignation without notice

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Dress Code—Exceptions for Religious Accommodations

- Policy should state that the employer will:
 - Comply with its obligations under state law and Title VII; and
 - Grant accommodations to employees to the extent required by law

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Unauthorized Overtime

- Employers should not state that unauthorized overtime will not be paid
 - Employers must pay employees for all overtime, even if it was worked without authorization
- Employers should discipline employees through its disciplinary process for unauthorized overtime

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Safe Harbor for Improper Deductions

- The FSLA provides a "safe harbor" for employers that may preserve an employee's exempt status, even if the employer makes an impermissible deduction

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Safe Harbor for Improper Deductions (cont.)

- "Safe harbor" criteria:
 - Employer must have a "clearly communicated" policy that prohibits improper deductions and the policy must include a complaint mechanism;
 - Employer must reimburse employees for any improper deductions; and
 - Employer must make a good faith commitment to comply with FLSA requirements in the future

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Anti-Harassment Policy

- Policy must be drafted in a way that can be understood by the workforce
- Reporting procedure must be very clear
- Provide the direct contact information (phone or e-mail) of the person to whom harassment should be reported

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Drug Policies

- Under the ADA, alcohol testing is considered a "medical" exam
- Policy should not permit or require:
 - Random alcohol testing
 - Mandatory post-accident alcohol testing

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Drug Policies (cont.)

- Alcohol testing is only permitted:
 - Following a conditional offer of employment (provided employer consistently requires employees in the same position to undergo such testing);
 - The testing is job related and consistent with business necessity; or
 - Pursuant to a Last Chance Agreement

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Confidentiality Policies

- Handbooks provide limited (if any) protection
- Consider separate confidentiality agreements

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National Labor Relations Act

- Social media policies
- Confidentiality of internal investigations
- Employment-at-will disclaimers
- Off-duty access rules
- Workplace conduct rules

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Social Media

- The NLRB found the following provisions in employment policies unlawful:
 - Requiring employees to obtain permission to use the employer's images and logos
 - Prohibiting behavior that "injures" the image or reputation of the employer
 - Requiring confidentiality
 - Prohibiting disparagement of the employer or members of its workforce

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Social Media (cont.)

- Recommendations:
 - Prohibit employees from making malicious, threatening or intimidating statements
 - Prohibit discriminatory and harassing comments
 - Refrain from instituting broad rules requiring courtesy
 - Include a savings clause: "No provision in this policy will be applied or construed in a manner that improperly interferes with, restrains or prevents employees' exercise of their rights under Section 7 of the National Labor Relations Act. This policy does not apply to employee communications regarding wages, hours or other terms and conditions of employment."

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Social Media (cont.)

- NLRB has found this policy to be lawful:
<http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd> (refer to the last three pages of the document)

Confidentiality of Internal Investigations

- Remove any blanket confidentiality requirement
- Indicate that, depending on the circumstances, employees may be required to maintain confidentiality

Employment-At-Will Disclaimers

- Handbook should not suggest that employment-at-will status can never change

Off-Duty Access

- Policy prohibiting off-duty access must not allow for any exceptions

Workplace Conduct Rules

- The NLRB found the following rules unlawful because they infringe on employees' rights to engage in protected concerted activity:
 - Prohibiting offensive, inappropriate or demeaning remarks
 - Requiring respectful treatment of co-workers
 - Prohibiting leaving post without supervisor permission
 - Prohibiting interruption of work

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Questions?

**If you have questions after the seminar,
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Thank You!

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