

**Bridge to Nowhere or
Bridge to Compliance:**
Is Your Employee Handbook Doing
More Harm Than Good?

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The contents of this presentation are not intended as legal advice. Please consult an attorney for advice regarding your individual circumstances.



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FIRST THINGS FIRST . . .

Should You Have an Employee Handbook?



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Advantages

- Communication and employee relations tool
- Promotes consistency
- Provide defense to certain unlawful discrimination claims—if well drafted
- Provides proof of misconduct

Disadvantages

- Substantial time and monetary commitment
- Pose risk of litigation if not drafted properly or regularly updated

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**THE TEN COMMANDMENTS
(of Employee Handbooks)**

I
II
III
IIII
V

VI
VII
VIII
VIIII
X

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FIRST
COMMANDMENT

1


Thou Shalt Know that the
Law is on Your Side (unless
you do something to
change this rule.)

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At-Will Employment

- SDCL 60-4-4. Termination at will.

An employment having no specified term may be terminated at the will of either party on notice to the other, **unless otherwise provided by statute (the BIG BUT...)**.



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The BIG BUT...

Exceptions:

- Violations of Law (ex. Discrimination)
- Oral or written contract
- Public Policy

Remember:

- If employee alleges termination for illegal reason, then employer must prove legitimate reason

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At-Will Employment

IMPORTANT: Employee Handbook should affirm At-Will Employment

- Proclaim
- Proclaim
- Proclaim

BUT! Potential NLRA Concerns?

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NLRB Invalidated the Following Disclaimer:

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

Unlawfully restricted § 7 NLRA Rights

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But, the next month the NLRB approved...


- "No manager... has any authority to enter into an agreement for employment... other than at-will."
- "No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship."

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Moral...

- Clearly State & Acknowledge "At-will" Employment in your employee handbook
- BUT be careful, and don't go too far!

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SECOND COMMANDMENT 

Thou Shalt Beware of Contractual Language Used in Employee Handbooks

It may be vexatious to the spirit and get you sued.

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Disclaimer.
Disclaimer.
Disclaimer.

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All handbooks should prominently
disclaim:

- An employment contract;
- A promise of continued employment;
- An obligation to discharge only for cause;
- An obligation to notify employees of change; and
- An obligation to continue benefits.

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Disclaimer

Consider placing an abbreviated disclaimer on every page or the first page of each section of a multi-section handbook.

This avoids the “I never saw it” claim.

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Handbook Horrors

- ❖ We pay comparable to other companies in the area.



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Policies To Avoid

AVOID

- Progressive discipline
 - Big fan of training managers to use but don't promise – ties employers' hands
- Probationary period – Problem: After completing probationary period, employee claims she can only be fired 'for cause' or 'with advanced notice'
 - What are you trying to accomplish?
 - Only justification: unemployment claims – SDCL 61-5-39
- Exclusive list of work rules
 - "Including, but not limited to" – lawyers' favorite words

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Courts will construe Handbook as a whole.

Rest of Handbook must be consistent with disclaimer.

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**THIRD
COMMANDMENT** 3

Thou Shalt Include a FMLA Policy (if applicable)

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Elements of a Well-Drafted FMLA Policy

- Definition of eligible employees
- Description of leave entitlement
- Measuring period
- Notice and certification requirements
 - Add call-in procedure
- Benefits
- Job restoration
- Must contain all information in FMLA poster promulgated by DOL and on website



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FMLA Policy *must* be Well-Drafted

- Be clear about your method of computing FMLA leave, or the court could may allow an employee to rely on any of the four, or even assert a bad faith termination claim
- If changing or defining policy for the first time, give employees 60 day notice

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**FOURTH
COMMANDMENT**

4

Thou Shalt Establish a
Policy Against Sexual and
Other Forms of Harassment

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Harassment Policy

Policy must prohibit all forms of harassment,
not just sexual harassment.

- Gender/Pregnancy
- Race
- Color
- Religion
- Age
- Disability
- National Origin
- Military/Veteran Status
- Genetic Information
- State Laws

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**Elements of a Well-Drafted
Harassment Policy**

- General definition of harassment
- Specific definition of sexual harassment



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Elements of a Well-Drafted Harassment Policy

- Reporting – who to report to
- Investigation – required; don't promise confidentiality
- Prohibition against retaliation
- Consequences

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FIFTH COMMANDMENT




Thou Shalt Establish
Policies Regarding
Employer Information

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Electronic Information

Key: No Presumption of Privacy



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Elements of a Well-Drafted Policy

- Ownership of messages/records
- Business use only, or is personal use allowed – if so, when
- Prohibited activities – violation of any company policy
- Message creation/retention
- Consequences for violations

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Trade Secrets – Confidentiality and Non Disclosure

- Define:
 - Marketing strategies
 - Customer lists
 - Research
 - Proprietary processes
- Consider Using Stand Alone Agreement

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Social Media Policy

- NLRA Concerns
 - NLRA Rights (Section 7): employees have the right to discuss wages and other terms and conditions of employment.
 - Unlawful for employee's rights to be violated (Section 8(a)(1)).
 - Consider using NLRB Model Social Media Policy.



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**SIXTH
COMMANDMENT**


6

Thou Shalt Confirm that All
Other Policies Comply with
Applicable Law

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Employment Alphabet Soup

- ADA
- ADEA
- COBRA
- EEOC
- EPPA



- ERISA
- FCRA
- FLSA
- NLRA
- PDA

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ACA

Affordable Care Act

- Employers must provide reasonable breaks for nursing mothers



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ADA

Americans with Disabilities Act

- Intended to remove both physical and intangible workplace barriers to disabled employees.


ADAAA

ADA Amendment Act - Effective Date: 1/1/2009

- Effect of Amendment
- A** --- **A**ssume
- D** --- **D**isability
- A** --- **A**lways
- A** --- **A**ttempt
- A** --- **A**ccommodation

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Internet-Use Addiction



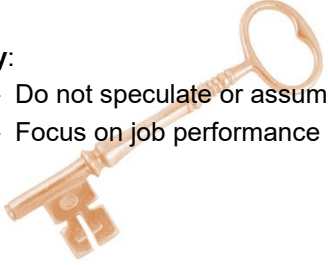
- DSM-5, the official psychiatrists diagnostic manual, classifies Internet-Use addiction as an actual disease.
- As a recognized illness, the condition *may* be eligible for ADA-required employer accommodation.
- Zero-tolerance policies restricting personal internet use *could* run afoul with ADA accommodation requirements!

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ADAAA

Key:

- Do not speculate or assume
- Focus on job performance

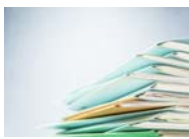


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ADAAA

Reasonable Accommodations

- Critical component of ADA
- Requires employers to engage in interactive process
- **DOCUMENT, DOCUMENT, DOCUMENT**




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MORAL:

Include Disability Accommodations Policy

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ADEA
Age Discrimination in Employment Act
– Provides additional protection to employees age 40 and older




Bankruptcy Code
– Prohibits adverse action based on bankruptcy

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COBRA
Consolidated Omnibus Budget Reconciliation Act
– Beware: Employees on unpaid leave

EPA
Equal Pay Act
– requires equal pay for equal work



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EPPA
Employee Polygraph Protection Act
– generally prohibits employers from using lie detector tests



ERISA
Employee Retirement Income Security Act
– governs every benefit plan

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FCRA

Fair Credit Reporting Act

- regulates use of credit reports and obtaining criminal background checks

FLSA


Fair Labor Standards Act

- requires payment of minimum wage and overtime unless exempt

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FLSA

Overtime Standard



- Employers must pay covered non-exempt employees overtime compensation at a rate of not less than one and one-half times the "regular rate" of pay for all hours worked over 40 hours in a workweek.
- Therefore define workweek

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FLSA

Other suggestions:

- Define exempt/non-exempt
- Address meal break

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FLSA Salary Safe Harbor

Include DOL Safe Harbor

- State policy against improper docking of pay for exempt employees
- Require employees to promptly report
- Provide prompt reimbursement

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FMLA

Family and Medical Leave Act

- Policy **MUST** be in Handbook

GINA

Genetic Information Non-Discrimination Act

- Prohibits discrimination based on genetic information

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HIPAA

Health Insurance Portability and Accountability Act

- Governs exchange of personal medical information

IRCA

Immigration Reform and Control Act

- Requires employers to verify eligibility to work in U.S.
- Address I-9s in connection with hiring practices

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NLRA

National Labor Relations Act

- Addresses concerted activity in workplace
- Avoid rules requiring employees maintain positive work environment
- Social media policies

OSHA

Occupational Safety and Health Act


- Beware mandatory drug testing post accident
- Beware safety bonuses

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PDA

Pregnancy Discrimination Act

- Treat pregnancy same as any other disability



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Protected Categories

What are they?

FEDERAL:

- Sex/Gender (including pregnancy) (LGBT?)
- Age
- Race
- Color
- National Origin
- Religion
- Disability
- Military/Veterans Status
- Genetic Information

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EEO Policy – Federal Contractors

- Demonstrates compliance with anti-discrimination laws
- Consider federal, state and local laws

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**Multistate Employer's
Compliance Quandary**



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Options

- (1) Separate Handbooks for each state
- (2) Single Handbook which complies with most protective state laws
- (3) Handbook compliant with federal law and addendums for each state where employees work

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**SEVENTH
COMMANDMENT**


7

Thou Shalt Include Only
Information Employees Need
and Provide it in Format
Promoting Understanding

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Sections of Handbook

- Welcome Statement
- Disclaimers
- EEO/Harassment
- Pay Practices
- Benefits
- Work Rules/Absences
- Resignation/Termination



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Elements of a Well-Drafted Handbook

- Clearly written (avoid legalese)
- Organized – Table of Contents
- Revision dates
- Avoid forms / Customize to work culture
- Be consistent

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Drafting Guidelines

- Use Positive, Professional Tone
- Avoid rigid rules
- Consider audience

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**EIGHTH
COMMANDMENT** 

Thou Shalt Circulate
Employee Handbooks to All
Employees and Obtain
Written Verification of Receipt

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Distribution

- Designate one person to distribute
- Consider hard copy versus intranet
- Obtain proof of receipt / training



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**NINTH
COMMANDMENT**


9

Thou Shalt Periodically
Review the Employee
Handbook for Compliance
with Current Law

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Consider:

- New state or federal laws
- New court interpretations of old laws
- Changing technology
- Changing social practices
- Changing business practices



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How do you implement changes
to Handbook?

- Notice
- Obtain written acknowledgment
- Keep copy of old version until SOL expires
- Unionized workforce must bargain about new policy

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**TENTH
COMMANDMENT**

10

Thou Shalt Consult Your
Attorney Early and Often

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