

# Top 10 Employee Handbook Mistakes

By: Jennifer Brown Shaw and Alayna Schroeder, Shaw Valenza, LLP

Done right, employee handbooks serve multiple functions. They provide employees with important information about a company, its practices and the working environment. They also help protect employers legally by setting clear expectations and standards that employees must comply with.

Done wrong, employee handbooks can do more harm than good. Policies that are too specific and rigid can potentially limit an employer's flexibility when dealing with real issues. Policies that are too general make it difficult for employers to hold employees accountable for their actions and behavior.

How does an employer find the right balance? The first step is knowing the potential pitfalls. Below are 10 of the most common employee handbook mistakes, and what to do about them.

## 10. An Overly Detailed Discipline Procedure

Some employers like to include a detailed discipline procedure in the employee handbook, specifying what disciplinary steps they will take if an employee violates company policy or does not meet performance standards. Employers favoring such procedures reason that they give employees guidance about what to expect so they can modify their behavior accordingly.

Unfortunately, these discipline procedures are often too detailed and constricting to address with workplace realities. For instance, a policy promising a verbal warning as a first disciplinary step does not make sense if the first incident is a serious violation of a harassment prevention policy or an act of workplace violence. In such a situation, an employer wants the flexibility to skip steps, or even ignore the process entirely. If an employer has a policy of employment at-will — that is, that termination and everything leading up to it can happen for any reason that is not illegal — then the employer has no obligation to provide a specific discipline procedure, much less explain it in detail. Instead, the employer can handle disciplinary issues as they arise, maintaining consistency by centralizing discipline functions (for example, by ensuring supervisors partner with Human Resources).

Some employers, aware of the potentially limiting impact of such a rigid discipline policy, instead repeat a cautionary phrase in various policies throughout the handbook. The phrase may state, "Violation of this policy may lead to discipline, up to and including termination of employment." Though the phrase does give an employer flexibility, its use in only select policies can also create confusion. After all, if the phrase appears in one policy but not another, does violation of the second policy not result in discipline? To avoid confusion and maximize flexibility, an employer should specify that violating any company policy — even one not stated in the handbook — has the potential to lead to discipline. Dealing with the issue upfront prevents the need to repeat the phrase throughout the handbook.

## 9. Not Controlling Meal and Rest Periods

California employers are all too aware of the potential financial impact of denying employees meal and rest periods. However, many employers address breaks by only generally promising to comply with the law, without explaining what that means. The California Department of Industrial Relations' Wage Orders and the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court* set forth specific standards for meal periods (for example, a meal period must begin no later than the end of the fifth hour of work but can begin anytime before that). Employers should refer specifically to all of these standards in their meal and rest period policy.

Employees should be advised that if anyone interferes with their ability to take their required meal and rest periods, they must notify their supervisors immediately.

## 8. Not Controlling Overtime

Like meal and rest periods, unauthorized overtime can create significant liability for employers. Overtime policies should be structured to limit unauthorized overtime. First, employers should define the “workweek” for purposes of calculating overtime (the workweek could be Sunday at 12 a.m. to Saturday at 11:59 p.m.). Otherwise, employees may be free to define the workweek as they choose, potentially increasing overtime liability.

The overtime policy also should specify that employees are not permitted to work overtime without prior supervisory authorization. Though an employer can’t refuse to pay an employee who works unauthorized overtime, the employer can discipline employees who fail to follow the specific directive not to work overtime without permission.

## 7. Improper Deductions and Proper Reimbursements

Some employers make a big mistake not only in making improper or illegal deductions from a paycheck, but also in reflecting that practice in their handbooks. Policies that state that salary advances or loans will be deducted from an employee’s final paycheck violate California final pay rules.

In addition to carefully ensuring any policies relating to deductions do not violate the law, employers should include a “safe harbor” policy that addresses deductions for exempt employees. This policy should require exempt employees to notify the employer immediately if they believe illegal deductions — such as certain deductions for partial-day absences — have been made from their salaries. Under the federal Fair Labor Standards Act, a safe harbor provision can help prevent reclassification of an entire exempt job class based on improper deductions made for a few holding the position.

Many employers also make mistakes when drafting expense reimbursement policies. Commonly, employers seek to encourage employees to submit business expenses for reimbursement promptly by stating that failure to do so within a certain timeframe will result in no reimbursement. Unfortunately, that kind of policy violates the California Labor Code. As with unauthorized overtime, employees should be directed to submit their expenses on time and in certain form. If they fail to do so, they can be disciplined. However, the employer cannot refuse to pay the expenses.

## 6. Putting a Cap on Medical Leaves

Under the federal Americans With Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA), employers may be required to permit an employee with a disability to take time off if doing so will allow the employee to recover and return to work. Unfortunately, few employers are aware that a policy imposing a “cap” on the amount of leave provided for this purpose — such as three months — can create legal problems.

In the past few years, the Equal Employment Opportunity Commission (EEOC) challenged several employers’ leave policies with longer but definite time limits, such as one year. In 2009, the EEOC settled a lawsuit against Sears Roebuck & Co. (Sears) for \$6.2 million. Sears maintained a policy permitting employees with workers’ compensation injuries to take medical leaves of up to one year, and the EEOC claimed the policy with its one-year “cap” violated the ADA.

When deciding how much leave is appropriate, the ADA requires an individual assessment. Employers can limit the possibility of problems with the EEOC — or employees filing lawsuits — by maintaining flexible leave policies that make clear each situation will be evaluated individually.

## 5. Use it or Lose it Vacation Policies

In California, vacation and paid time off (PTO) is considered a vested wage. In other words, employers can’t take accrued vacation or PTO away from employees. Many employers encourage employees to use accrued vacation or PTO during the year in which it is accrued. That reduces the liability for unpaid vacation/PTO on the books and encourages employees to recharge their batteries. Employers can’t encourage employees to take vacations with a “use it or lose it” policy. Under such a policy, an employee who fails to use all his or her vacation/PTO at the end of the year loses the right to take it. As discussed above, because vacation/PTO is considered a wage, such a policy deprives employees of a vested right.

Instead, vacation policies should be written to allow accrual up to a maximum, with no additional vacation accrual once an employee reaches the maximum. If an employee's accrual falls below the maximum, then he or she begins accruing vacation again. The maximum should be a "reasonable" amount, so that employees have sufficient opportunity to take time off. The Labor Commissioner has stated, for example, that one year's worth of vacation is not reasonable. So employees should be permitted to accrue more than one year's worth of vacation. Generally, adopting a maximum or "cap" of 1.25 times the annual accrual should be sufficient.

#### **4. Overly Broad Electronic Communications Policies**

The reality of many workplaces today is that employees need access to e-mail, the Internet and other modes of electronic communication to do their work. For employers, these technologies have potential downsides, such as wasted time, security problems and the possibility that employees will use these means to violate company policy. To control these problems, some employers specify that electronic communications and systems can be used only for business purposes.

However, the federal National Labor Relations Board (NLRB) has taken the position that an employer's rigid policy prohibiting the use of its electronic communications systems for any non-business purpose may have the effect of "chilling" union organizing (referred to as "section 7 rights"). Such a restriction, the NLRB reasoned, could violate the National Labor Relations Act. Therefore, a policy on electronic communications should not entirely prohibit use of electronic systems for non-business use.

Employers should not eliminate electronic communications policies entirely, however. An electronic communications policy is important because it informs employees they do not have a reasonable expectation of privacy in documents and other communications (such as text messages or voicemails) they create with the employer's resources, including electronic resources. These admonitions can protect an employer down the road. For example, in a recent California case, an employee who sent electronic communications to her attorney from her work e-mail address could not bar the employer from later accessing the communications.

#### **3. A Rigid Harassment Prevention Policy**

A "no harassment" or harassment prevention policy is a must-have for all employee handbooks. It helps employers defend claims of harassment when employees fail to follow the company's internal processes for reporting potentially harassing behavior.

But employers must be careful when defining the behavior that violates the policy. Employers should not focus on "unlawful" harassment, or use an overly legal definition of "harassing" conduct. For example, if a policy defines a "hostile work environment" in the same way the law does, then any violation of the policy will automatically be a violation of the law. To avoid this result, the employer should define "harassment" under the policy using a stricter standard than the actual legal definition. A policy could define harassment as "disrespectful or unprofessional conduct based on a protected characteristic, such as sex, race or national origin." Then, an inappropriate joke based on one of these characteristics would violate the policy, not the law.

In addition, using legal definitions to define conduct that violates a harassment policy reduces an employer's ability to put a stop to behavior before it escalates. Such a policy does not notify employees to report potentially problematic behavior early, as soon as they are aware of it, because only more serious conduct violates the law. Another common mistake is to limit harassment prevention policies to harassment based on sex and nothing else. Though sexual harassment complaints are still prevalent, employers increasingly see harassment complaints based on race, age or other protected categories.

Finally, harassment complaints should not be required to take a particular form. An employer may be legally responsible for employee behavior as soon as the employer knows or should have known about potentially harassing conduct. Instead of focusing on strict requirements, such as written complaints or complaints directed to HR, an employer's policies should focus on allowing employees multiple avenues for reporting behavior and training supervisors so they know how to respond to employee complaints.

## 2. Over- or Under-Acknowledging

Employers can and should request that employees acknowledge receiving and reading the handbook. But employers sometimes take this concept too far. For example, some request multiple acknowledgments for different policies, but then do not carefully track the receipt of the various acknowledgments to ensure each employee signed and returned each one. Other employers require employees to acknowledge having read the handbook, even though they know or should know that the employee has not actually done so (for example, because employees receive the handbook and immediately sign and return the acknowledgment).

Most importantly, an acknowledgment is a key place to reiterate a concept that the employer should have communicated many times already: employment at-will. That means either party can end the employment relationship at any time, for any reason and with or without notice. The acknowledgment should also specify which specific person (such as the company CEO or president) can make an agreement to the contrary on the company's behalf, in a written agreement only. This language gives the company the flexibility to make a written agreement in the limited circumstances in which it might prefer to — perhaps when hiring a highly sought executive — without unknowingly creating an agreement to the contrary.

## 1. Not Reviewing/Revising the Handbook Regularly

Employment laws change frequently. Though not every change necessitates a new version of a handbook, the handbook should be reviewed regularly so policies can be amended or updated when appropriate.

Keeping policies up-to-date ensures decision makers and employees are informed. For example, although HR professionals may know that California law grants paid leave to employees who are bone marrow or organ donors, rank and file supervisors, who usually receive leave requests, may not. A handbook is a great place to summarize information for the benefit of employees and for the benefit of those people who will help an employer implement the policies. It also gives everyone direction about where to go with workplace concerns not addressed in the handbook.

## What Next?

An employee handbook is an important document that can protect an employer from liability. Several new laws affecting California employers — and their handbooks — recently went into effect. Your handbook should reflect these laws, where appropriate. If you do not have an employee handbook, now is a good time to create one. If you do have one and have not reviewed it recently, you should consider updating it. In either case, the principles outlined in this white paper should help you avoid some of the most common handbook mistakes and realize your handbook's full potential.

*About the Authors: Jennifer Brown Shaw is a founding partner of Shaw Valenza LLP, a Sacramento/San Francisco employment law boutique. The firm's practice exclusively focuses on representing management in employment law advice, training, investigations, litigation and appeals. Alayna Schroeder is an associate in the firm's Sacramento office.*

## CalChamber Can Help!

CalChamber's Employee Handbook Creator™ online tool takes the guesswork out of creating an employee handbook. Access the convenient tool from your PC or Mac, desktop or tablet. Its smart, comprehensive wizard asks a series of questions put together by CalChamber's employment law experts. It even identifies required policies. So you can decide what you want or need in your handbook. Best of all, there's no software to install.

Learn more at [calchamber.com/ehconline](http://calchamber.com/ehconline) or by calling our Customer Service Representatives at (800) 331-8877, Monday through Thursday from 8 a.m. to 5 p.m. and Friday from 8 a.m. to 4 p.m. PT.

v022514