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SPECIAL FEATURE

Employment Policies Need Updating in New Year

By William E. Hannum III

Every New Year's, we remind employers to review their employee handbooks and ensure that their personnel policies are up-to-date and legally compliant.

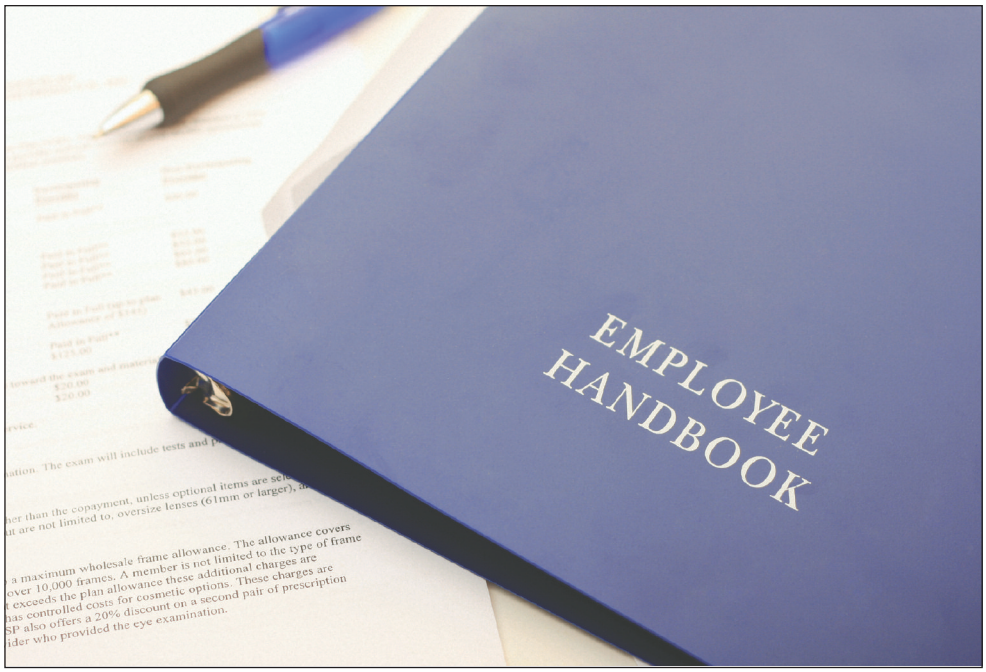
In that regard, "up-to-date" means that the handbook reflects changes in applicable law, changes in the employer's locations (e.g., doing business in a new state), and changes in the employer's practices.

Employers should review personnel policies annually, so if handbooks haven't been updated since January 2010, it is clearly time for a review, especially given the number of changes to employment laws in the past year.

At a minimum, the following policies need to be addressed based on changes in the law over the past year:

Nursing mothers. The federal Patient Protection and Affordable Care Act amended the Fair Labor Standards Act, effective March 23, 2010, to provide certain protections for nursing mothers. In particular, nursing mothers must be provided with a private room and time off to express breast milk for one year following the birth of her child.

While the requirements apply to all employers subject to the FLSA, employers with fewer than 50 employees are exempt if compliance would "pose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." Employers of all sizes should consider including a policy to address the new law.



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Overtime. On March 24, 2010, the U.S. Department of Labor's Wage and Hour Division issued an administrative interpretation regarding the administrative exemption under FLSA.

The interpretation created a distinction between production duties (i.e., doing what the business does), which are no longer exempt under the administrative exemption, and management duties (e.g., duties related to finance, HR, customer service and quality control), which continue to be exempt.

The interpretation signals a significant change in the Department of Labor's views regarding the administrative exemption from overtime requirements.

In addition to this notable interpretation, there has been significant litigation and enforcement activity related to wage and hour issues over the past year. We recommend that all employers review their policies, practices and job descriptions regarding FLSA classifications to ensure that all classifications are consistent with the evolving law in this important area.

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Benefits. The U.S. District Court for the District of Massachusetts held last July that the definition of "marriage" and "spouse" under Section 3 of the federal Defense of Marriage Act is unconstitutional. The case is currently being appealed to the 1st Circuit and applies only to the particular plaintiffs in that case.

The ruling, however, raises the possibility that both public and private employers may soon be required to recognize same-sex spouses for purposes of marriage-based federal employee benefits.

Accordingly, employers may want to consider reviewing plan documents and policies relative to marriage-based benefits and the definitions of "spouse" and "marriage."

Personnel records. The Massachusetts personnel records statute was amended on Aug. 6, 2010, to include two new provisions.

The first requires employers to notify an employee within 10 days of placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.

The second provision limits the number of times an employer must provide an employee with access to his or her file.

While neither of these amendments necessarily compels a revision to an employee handbook, employers should review their current policy, practices and training to ensure that personnel files are maintained in compliance with the law.

CORI. Gov. Deval L. Patrick signed into law "An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release," known informally as "CORI Reform." Effective Nov. 4, 2010, the act prevents most employers from seeking disclosure of job applicants' criminal record information at the initial application stage.

Beginning in 2012, CORI Reform will impose numerous additional obligations on employers that rely on criminal history records to make employment decisions. In particular, CORI Reform will require a specific policy for employers who conduct five or more criminal background checks annually.

EEOC and anti-harassment. The federal Genetic Information Nondiscrimination Act became effective on Nov. 21, 2009, with the U.S. Equal Employment Opportunity Commission issuing corresponding regulations last November. Employers should review their equal employment opportunity, anti-harassment and related policies to ensure compliance with GINA and the recently promulgated regulations.

Texting while driving. Texting while driving became illegal in Massachusetts effective Oct. 1, 2010. Many states, including California, Connecticut, New Jersey, New York and Washington, as well as the District of Columbia, have likewise banned the use of hand-held cell phones while driving. Others, such as Maine, have banned "distracted driving."

Employers should consider implementing a policy to ensure compliance with the law, while perhaps also outlining the employer's philosophy about this issue, with respect to company cars and driving during work hours.

Anti-bullying. Employers may want to consider adopting a general anti-bullying program, including anti-bullying policies and plans, and anti-bullying training. While there are no laws that expressly prohibit bullying in the workplace, such laws have been in the works, have come close to being passed, and are likely to be passed in the future.

Further, an anti-bullying program may improve productivity, reduce the risk of litigation and reduce employee turnover. Bullying is frequently cited as a high-risk factor in triggering employment litigation.

Whistleblower policy. Whistleblower and retaliation cases are still on the rise. If they have not done so already, employers should consider implementing a policy that specifically addresses internal reporting procedures and that prohibits retaliation for raising such concerns.

Electronic communications and social media. Employees' online activities continue to impact the workplace. Employers should review their electronic communications and social media policies and practices to ensure that such policies address employees' blogs and online profiles, without violating employees' privacy rights and their right to engage in concerted activity.

Multi-state employers. In addition to reviewing these changes in the law, employers should review all personnel policies to consider the laws of all states in which they operate.

In particular, employers should focus on any states into which they have recently expanded, to ensure that written policies comport with state law.

Many states have at least a few unique laws that are dramatically different than the standard laws in other states. Thus, preparing a multi-state employee handbook and managers' guide requires thorough research and careful analysis to ensure that any inconsistencies in state law are properly addressed and resolved in the handbook.

Policy vs. practice

Further, employers should carefully review their current actual practices to ensure that policies accurately reflect current practices. This is an area in which employers frequently get themselves into trouble.

Unfortunately, most employers do not discover the problem until they are in litigation and learn that the policy and the practice are inconsistent.

At best, the result is the embarrassment of looking sloppy to a judge or arbitrator. At worst, the employer may lose a significant legal claim predicated on breach of contract, employment discrimination or some other applicable theory.

Thus, it is critical that employers ensure that their policies are consistent with their current practices.

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