

It's Time to Review Your Employee Handbook

NLRB rulings and new anti-harassment, marijuana and leave laws may prompt changes
By Lisa Nagele-Piazza, J.D., SHRM-SCP January 15, 2020

Staying abreast of the evolving regulatory environment remains one of the biggest headaches—particularly for employers with multiple locations—given the web of sometimes conflicting requirements, said Mark Keenan, an attorney with Barnes & Thornburg in Atlanta.

Organizations should consider designating an employee in the HR or legal department to lead the compliance effort, he said.

Franklin Wolf, an attorney with Fisher Phillips in Chicago, noted that dealing with different state and local requirements can be difficult. But it's necessary to best avoid—and defend against—claims that might arise, he said.

Employers may choose to adopt policies and practices that comply with the most restrictive applicable location. This can be a safer and more administratively simple approach for multistate employers, Wolf noted. But developing jurisdiction-specific policies and practices may be more cost effective in some cases.

Although there are many legal changes that may impact a specific location, here are some of the hot topics for 2020.

Labor Board Gives Employers Flexibility

The Republican-led National Labor Relations Board (NLRB) has issued employer-friendly decisions in recent years. "2020 is a good time to take a fresh look at employee handbook rules that in the past were constrained by decisions of the NLRB," said Frederick Miner, an attorney with Littler in Phoenix.

The board's recent rulings provide considerable flexibility in many important areas, he noted, including rules prohibiting workplace recordings and requiring confidentiality of workplace investigations. The board also ruled that employers don't have to allow employees to use company electronic resources for union solicitation purposes.

"Importantly, civility rules now are treated by the board as categorically lawful under federal labor law," Miner said.

The NLRB issued a new test for balancing employee rights against management rights, noted Melanie Pate, an attorney with Lewis Roca Rothgerber Christie in Phoenix. Employees may disclose information about their pay and benefits, but they cannot threaten violence or use language that creates a hostile work environment.

So employers may want to consider adopting policies that prohibit verbal abuse and profane language.

Anti-Harassment Efforts

Legislation reflecting the #MeToo movement will continue to change the legal landscape, Wolf observed. Starting in 2020, Illinois employers must add certain information to their anti-harassment policies, including specific examples of conduct that may constitute harassment, definitions of harassment that are compliant with state law and contact information for administrative agencies that investigate and enforce anti-discrimination laws.

California, New York and other states and cities also continue to update their anti-harassment laws and training requirements. "Employers must ensure that they have effective training and prevention programs in place," Pate said, noting that equal employment opportunity and sexual-harassment-prevention policies should be included in all employee handbooks so that employees fully understand the company's complaint and investigation procedures.

Protection for Marijuana Use

States continue to legalize medical and recreational marijuana. These laws don't allow workers to be under the influence on the job, but some laws may limit employers' disciplinary options and provide employment protection for off-duty use.

Employers should be aware that their ability to discipline an employee for being under the influence of marijuana may have been altered, Wolf said. For instance, in Illinois, an employee who is found to be under the influence of marijuana needs to be provided a reasonable opportunity to respond to any resulting disciplinary action.

Nevada and New York City also passed laws prohibiting employers from considering a pre-employment marijuana test result, though both laws have exceptions for safety-sensitive positions and jobs regulated by federal programs that require drug testing.

Family-Friendly Focus

"Family-friendly policies will continue to expand as the economy continues to grow," Pate said. For instance, the federal Fair Labor Standards Act provides unlimited breaks for working mothers to express milk for the first year after a child's birth. This rule applies to all employers with 50 or more workers. Businesses with fewer employees are not subject to the federal requirement if it would impose an undue hardship. Some states and cities have more-stringent requirements and cover smaller employers.

Additionally, many states and cities have passed paid leave laws in the last year. These laws may cover sick leave, family leave and domestic violence leave.

Predictable Scheduling Requirements

"We're also seeing state and local jurisdictions legislate in areas that have traditionally been considered areas of management prerogative," Keenan said. Oregon, as well as a number of local jurisdictions including Chicago, New York City, Philadelphia and Seattle, have adopted predictable scheduling laws. Although the requirements of these laws vary, he said, most require advance notice of schedule changes and notice of anticipated work schedules at the time of hire and impose significant requirements with respect to payroll and scheduling documentation.

Stronger Privacy Laws

"Employers need to be mindful of the increasing risks associated with data breaches, [Health Insurance Portability and Accountability Act] requirements and other issues not typically thought of in the employment context, and confirm they have appropriate policies," Keenan said.

For 2020, certain California employers will need to be aware of requirements under the California Consumer Privacy Act, which requires covered businesses to roll out policies and procedures to protect consumer and employee data.

Hairstyle Discrimination Bans

More jurisdictions are adding hairstyle to the list of protected traits under anti-discrimination laws. California's SB 188 took effect on Jan. 1 and expanded the definition of "race or ethnicity" to include traits historically associated with race, such as hair texture and protective hairstyles, like as braids, locks and twists.

Employers should review their handbooks for any language regarding dress codes, employee appearance and hairstyles to ensure those policies do not explicitly or implicitly run afoul of the new law, said Mark Payne, an attorney with Troutman Sanders in Orange County, Calif. "Even seemingly mundane language requiring an employee's hairstyle to remain neat or presentable may be interpreted as implicitly discriminating against protected hairstyles," he added.

New York and New Jersey also banned hairstyle discrimination in 2019.