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Labor and Employment Update - Why Your Company Should Have an Employee Handbook

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As your company grows, it becomes more vulnerable to certain legal claims by applicants, employees, and former employees. A well drafted employee handbook can help your company avoid or defeat such claims by: (1) decreasing the potential for litigation or, in the event of litigation, bolstering your company's defense by setting forth key policies, such as constructive discharge, equal employment opportunity, anti-discrimination and anti-harassment policies, as well as the procedures for reporting complaints; (2) protecting your company's interests by defining the company's trade secrets and other confidential and proprietary information; (3) improving communication between your company and its employees by stating the company's mission and emphasizing the consistent enforcement of policies; and (4) clarifying your company's expectations and reducing the fear of the unknown (e.g., performance standards, safety rules, dress code, vacation policies, attendance requirements, and prohibited conduct).

It is critical that an employee handbook be well drafted. Indeed, the only situation worse than not having an employee handbook is having one that is poorly written. A poorly drafted handbook can have the effect of making unintended promises to employees and inadvertently altering the terms of the employment relationship. With a few exceptions, employment in Arizona is "at-will," meaning that either the employee or the company can terminate the employment relationship at anytime, with or without cause or notice. However, a poorly written handbook may contain language that could be construed as restricting the company's right to terminate an employee and, thus, eradicate the presumption of at-will employment. To avoid this scenario, an employee handbook should exclude such language. Moreover, the handbook must include a prominent disclaimer that the handbook does not constitute a contract of employment and does not alter the at-will relationship between the company and employee. For added protection, the disclaimer also should reserve the company's right to amend the handbook at any time.

Smaller companies often are often under the mistaken belief that they do not need an employee handbook because they only employ a handful of individuals. However, because some laws apply to companies that employ only one person, all companies can benefit from an employee handbook with some key policies. Indeed, depending on the number of employees your company employs, the following employment laws may apply to you¹:

- **One or More Employees -**
The Arizona Civil Rights Act (ACRA) prohibits sexual harassment in the workplace. The federal Equal Pay Act (EPA) requires employers to pay men and women "equal pay" for "equal work."
- **15 or More Employees -**
The ACRA and the federal Title VII of the Civil Rights Act (Title VII) prohibit discrimination against employees and applicants on the basis of race, color,

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¹ These criteria are specific to private employers and may be different for public employers.

religion, sex (including pregnancy), and national origin. The ACRA and the federal Americans with Disabilities Act (ADA) prohibit discrimination against qualified employees and applicants with disabilities.

- **20 or More Employees -**

The federal Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees and applicants who are 40 years of age or older.

- **50 or More Employees Within a 75-Mile Radius of a Work Site -**

The federal Family and Medical Leave Act (FMLA) requires covered employers to grant up to 12 weeks of unpaid leave during a 12-month period to eligible employees.

In light of the above employment discrimination laws, handbooks should include equal employment opportunity, anti-discrimination, and anti-harassment policies, as well as the procedures for reporting complaints. If your company is a covered employer under FMLA, you are obligated to inform employees about the terms and conditions of FMLA leave; therefore, all necessary information also should be included in the employee handbook.

Certain other employment policies also are critical for protecting the company's interests. For example, the employee handbook should contain a constructive discharge policy that outlines the steps an employee must follow before resigning due to a perceived intolerable work environment. Including a constructive discharge policy compliant with applicable law in your handbook could bar a constructive discharge claim if an employee resigns without first following the steps prescribed in the company's policy.

An electronic communications policy also may help your company protect its interests by, among other things, ensuring employee productivity and detecting and curing inappropriate conduct in the workplace. This policy will inform employees of your company's expectation on the proper use of electronic communications, such as e-mail, voicemail, and Internet usage, and give them advance notice that their communications may be monitored and intercepted. If you choose to adopt such a policy, you should have your employees sign a separate well written acknowledgement authorizing such monitoring to help avoid potential claims under applicable law.

Similarly, a confidentiality agreement may help your company safeguard its confidential and proprietary information. A well written policy should provide a clear definition of what categories of information constitute confidential and proprietary information and trade secrets so that there is no confusion. The policy also should expressly prohibit employees from using or disclosing such information for any reason other than the benefit of the company.

Depending on your business, including the potential for serious workplace injuries, the degree of suspected employee drug and alcohol abuse, the status as a federal contractor, and the corporate culture, you may wish to have a drug and alcohol testing policy. If you have such a policy, it should be included in the employee handbook. Adopting a policy that complies with Arizona's drug testing laws is not mandatory, but if your company chooses to do so, your company may be provided with a measure of protection against suits by employees alleging false positive test results. If you choose to adopt such a policy, you should have your employees sign a separate well written acknowledgement authorizing testing to avoid potential claims.

Finally, regardless of which policies your company ultimately chooses to include in its handbook, your company should require all employees to sign an acknowledgment that they have received, read, and understand it. A signed acknowledgement is of little to no value if the employee merely accepts receipt of the handbook and immediately signs the acknowledgment when the supervisor knows the employee has not read it. The company ideally should give the employee time to read the handbook, then have the employee return later to sign an acknowledgment that the employee has read and understands the handbook's contents. The company should keep the signed acknowledgment in the employee's personnel file.

The cost incurred creating or revising your company's employee handbook on the front end outweighs the substantial costs that may be incurred defending employment-related claims on the back end. If your company is interested in

creating an employee handbook that is tailored to meet your unique needs, or if you are interested in having your current handbook reviewed to ensure compliance with state and federal law, please contact a member of the Labor & Employment Practice group at Fennemore Craig.

Also, watch for your invitation to our next breakfast seminar, scheduled for March 22, 2006 at the Arizona Inn in Tucson and March 23, 2006 at the Phoenix Airport Marriott in Phoenix. You may register at www.fennemorecraig.com.

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