

# Down in Black and White

## The Latest Word on Company Handbooks

Paul Rothschild weighs in below

By GEORGE O'BRIEN



*Paul Rothschild says employers need to state clearly, and often, that their handbook is not to be considered a binding contract.*

*The employee handbook has been part of the business landscape for decades, and its basic purpose — to inform workers of a company's policies and operating philosophies — hasn't changed. What has changed, for most businesses, is the length of the table of contents, with recently added language to include everything from Internet-use restrictions to policies on whistleblowing. Now, as always, the challenge for employers is to write a handbook that protects them instead of leaving them vulnerable to litigation.*

John Sikorski says employee handbooks should — and usually do — reflect the character of businesses and their owners.

Take, for example, the section on offenses that will lead to discipline, 'up to and including termination' — that's the phrase employers must learn to use. Some are common acts, like stealing or physical violence toward a customer or fellow employee, while others are more unusual and often drawn from past experiences of a business owner or manager.

"I remember one individual who listed 'organized gambling,'" said Sikorski, an employment law specialist with the Springfield-based firm Robinson Donovan who has been writing handbooks for more than 20 years. "The COO of the company had a problem with a business he had been with in Rhode Island; a group of employees ran a big-time gambling and

loan-sharking operation on the loading docks, which was eventually raided by the FBI, bringing some publicity and embarrassment. I didn't think that would be a problem in Chicopee ... but I put it in there anyway."

The anecdote serves up a good example of why handbooks are needed, often personalized, and should be quite detailed when it comes to what is expected of employees, and what will and won't be tolerated.

"No firing should be a surprise," said Sikorski, adding that for this reason, and many others, handbooks should not be on any business owner or manager's do-it-yourself list.

One can download language and basic handbook formats off the Internet, said Paul Rothschild, an employment law specialist and litigator with Bacon and Wilson, but, as is the case with wills and other estate planning documents, this work of writing a handbook is better left to people versed in this subject.

And by that, he means the

changing landscape of employment law, one in which business owners and managers find themselves more vulnerable to lawsuits from disgruntled or terminated employees than ever before. Thus, topics that are, or should be, covered in a handbook now run the gamut, from absenteeism to fraternization policies; from language on the Federal Family Medical Leave Act to restrictions on Internet use; from policy on body piercing to thorough explanations of what constitutes sexual harassment.

But a handbook should be tailored to a specific company and its industry, he explained, adding that employers could unwittingly place themselves in harm's way by leaving things out, putting items in that don't need to be in, or using verbiage that doesn't adequately protect them.

"Avoid the boilerplate language," said Rothschild. "What's good for one company isn't necessarily good for another."

A handbook must be comprehensive, he continued, but it

should never be presented as a contract, and wording to this effect should be clear, prominent, and in several locations within the document. But even with such language, some courts are divided on the issue of whether a handbook constitutes a binding contract (more on this later).

As a result, the challenge for all employers is to craft a handbook that is informative, but also serves to protect the company, not leave it vulnerable to litigation.

The various aspects of the modern handbook come together in Baystate Health's document, a massive, 200-page offering that exists mostly online (hard copies are available to those who need them), and thus it is not called a handbook.

Instead, it's referred to as 'Baystate Health Human Resources Policies,' said Jo-Ann W. Davis, Esq., director of Employee Relations for the systems, whose job description includes making sure the document is as comprehensive and current as possible.

"The policies are updated routinely, because statutes change or we've changed our own internal policies," said Davis, a former partner with the Springfield-based law firm Skoler Abbott & Presser and specialist in employment law who came to Baystate four years ago. "We're continually reviewing, updating, or modifying the policies, and the most important thing is to make sure employees are aware of the changes."

One of the latest changes is a new policy on smoking that restricts it to one designated area at each Baystate facility (there used to be six such locations) and forbids employees from smoking on paid time. The system goes one step further in March, when it prohibits smoking altogether.

“There are some health care organizations around the country that have implemented the no-smoking policy that we currently have, but we’re charting new territory with the full ban,” said Davis, adding that the policy, thoroughly researched to ensure it will hold up to possible court challenges, is, like everything else in the book, reflective of the culture at Baystate.

In this issue, *BusinessWest* looks at the often-overlooked employee handbook, and how business owners can use them to not only protect themselves, but also set a tone for the company and its future.

### Chapter and Verse

Indeed, Sikorski recommends that each handbook start with a note from the business owner or CEO, in which the business’s history, value statements, and goals for the future are outlined.

“This is just one of the ways a handbook can bring positive value,” he said, adding that another is including in the document a comprehensive list of perks and programs provided by the business in question. “Companies provide a lot of benefits that don’t show up on the paycheck; the handbook is a way to communicate all that an employer does for employees.

“The better-written handbooks can really set a tone for a company,” he continued. “Business owners should take advantage of that opportunity and write an introduction that creates a dose of enthusiasm.”

Davis agreed. “It’s not just a list of things you can’t do,” she said of Baystate’s policies document. “It’s how we keep employees fully aware of what they’re entitled to.”

Employee handbooks have been in use for decades, said Rothschild, and utilized primarily to clearly spell out a company’s thoughts and policies on everything from time off for jury duty and funerals to dress codes, and put them in a very accessible place. The goal, since the first

handbooks were published, has been for the employer to remove any semblance of ambiguity when it comes to regulations or standards of conduct — thus protecting both employers and employees.

However, some new pieces of employment law legislation, such as the Family Medical Leave Act, the Americans with Disabilities Act, and others, as well as changes in technology and the

*“Employees have often thought that E-mails were their private information, but handbooks are now saying that E-mail and the computer system belong to the employer, and that employees should not consider E-mail to be private.”*

generally litigious nature of society has made the handbook and its contents more important than ever, said Ralph Abbott, a partner with Skoler Abbott & Presser.

“There are some lawyers who might still advise business owners that they don’t need a handbook,” he said, noting that some believe the documents, because they specifically spell out policies and disciplinary procedures, may leave employers vulnerable. “But, on balance, companies are better off to have one, because if they don’t, they leave themselves open to questions about whether they’re treating everyone the same. If you’re not, you’re opening yourself up to a host of issues and lawsuits.

Abbott told *BusinessWest* that he’s been writing handbooks for more than 30 years, and has noted many changes and additions to the table of contents, as well as some sticky questions brought on modern office technology, especially the Internet.

Conducting union activities online is just one example, he said, noting that most employers include language in their handbooks forbidding use of the

Internet for such activity, which leads to questions of discrimination when other, non-business uses are frowned upon, but still permitted.

“It’s not OK to get union-related solicitations or E-mails or to go online and look for a union,” he said, “but it’s OK to shop online or E-mail your friends or send jokes or surf the Net. The NLRB is struggling with this and other issues of possible discrimination.”

ing that companies must be diligent about putting down in black and white what can and can’t be done regarding E-mail, Internet use, even the cameras in cell phones.

The first order of business, he said, is to state early and often that, when it comes to telecommunications technology and their use in the workplace, employees must have no expectation of privacy — because they have no real right to it when they are using the property of their employer.

“Employees have often thought that E-mails were their private information,” he explained, “but handbooks are now saying that E-mail and the computer system belong to the employer, and that employees should not consider E-mail to be private or their own personal information.”

Sikorski agreed, and said employers need to clearly stress this point, while also specifically outlining what computers, E-mail, and all telecommunications technology can and should not be used for. He pointed to Internet acceptable-use policy he included in one area company’s handbook as effective language for most employers. The employer in question actually encourages employee use of the Internet to:

- Perform research and acquire information related to, or designed to facilitate, the performance of regularly assigned duties;
- Communicate with fellow employees regarding matters within an employee’s assigned duties;
- Transfer files and other information pertaining to matters within an employee’s assigned duties; and
- Facilitate performance of any task or project in a manner approved by an employee’s supervisor.

There is also policy regarding personal use of the Internet, as follows: “Computer-related resources should not be used for

Such questions present strong arguments for having a comprehensive, up-to-date handbook, he continued, but also consistency when it comes to enforcement of the policies contained in that document. “And consistency has to come from management.”

Overall, a handbook is designed to explain policies and ‘rights,’ for workers, said Sikorski, noting that all employees today are in what are known as ‘protected classes,’ which include sex, age, race, disabilities, sexual preference, and others. Thus, the handbook must spell out these protections, as well as non-permitted behavior.

One area in particular that warrants attention and several paragraphs in any handbook is the subject of sexual harassment, said Sikorski, noting that employers must not only inform employees that harassment is forbidden, they must educate them as to what it is — and isn’t.

### Technically Speaking

Recent developments in technology have prompted many changes and additions to the handbook, said Rothschild, not-

personal gain. While the use of computer-related resources is intended for job-related activities, incidental and occasional brief personal use is permitted within reasonable limits during appropriate break periods. Incidental personal use is a privilege that can be lost through abuse.”

While there is some measure of subjectivity in this language, and words like ‘incidental,’ ‘occasional,’ ‘brief,’ and ‘reasonable,’ there should be nothing subjective about prohibited activities when it comes to the Internet, said Sikorski, who, working with the client, listed uses that are “expressly and strictly prohibited,” including:

- Copying, disseminating, or printing copyrighted materials (including articles and software) in violation of copyright laws;
- Using offensive or harassing statements or language including disparagement of others based on their race, national origin, sexual orientation or preferences or perceived sexual orientation or preferences, sex, age, disability, or religious beliefs;
- Operating a business, soliciting money for personal gain, or searching for employment outside the company;
- Gaining or attempting to gain unauthorized access to any computers, computer networks, stat bases, data, or electronically stored information; and
- Using access for the purpose of day trading of stocks and/or bonds or other stock market transactions.

### It Takes Discipline

But the modern handbook must deal with issues that go well beyond technology and the many ways it can be used, said Sikorski, adding that recent events and societal trends should prompt inclusion of language on such items as whistleblowing, fraternization, and even internal-dis-

pute-resolution policies.

The Enron scandal and other highly documented cases of corporate impropriety have essentially changed the landscape on whistleblowing, he explained, noting that, increasingly, employers are finding it prudent to encourage employees to report wrongdoing when they witness it.

Language to that effect, included in one recent handbook Sikorski wrote, went thusly: “[The company is] committed to ethical behavior and integrity in business throughout all channels of the organization. As an employee, all actual or suspected irregularities must be promptly reported to management. The Human Resources director, president, and vice president have been designated as immediate contacts for the reporting of any known or suspected irregularities, conflicts of interest, or issues regarding business integrity or questionable ethics. Any of these individuals may be contacted directly by letter or telephone. Such communications will be dealt with confidentially.”

Other emerging trends in handbook language include careful thought about desired conduct on and off the job, said Sikorski, adding that business owners are spelling out what they expect from their employees. Most handbooks now have partial lists of offenses in both categories that will lead to disciplinary action, he said, noting that off-the-job transgressions include such things as driving under the influence, vehicular homicide, possessing or selling drugs, or other offenses that would reflect negatively on the company.

Meanwhile, on-the-job offenses can and often do extend beyond the obvious — stealing or other unethical acts, or absenteeism — and include tenets of corporate culture, such as the ability to work effectively in a team setting.

“In a couple of places in the handbook, you have to write that you expect everyone in the company to work together as part of a team to deliver excellent customer service, and that people who can’t do that have no place in the organization,”

Sikorski explained. “That gives you a tool for disciplining the employee with the poor attitude, the disruptive employee, the employee who won’t buy into teamwork.”

With both on-the-job and off-the-job offenses that could lead to discipline, employers must be very careful to state the penalties, and how the business owner has discretion over what they will be. Here is where the phrase ‘up to and including termination’ comes into play, said Abbott, referring to the practice of progressive discipline, and adding quickly that, by itself, that language may not be enough to protect employers.

“I prefer to be a little more explicit,” he said, “and include words to this effect: ‘depending on the nature of the events and the circumstances, the employer reserves the right to determine the appropriate level of discipline — up to and including discharge.’”

Meanwhile, Abbott strongly recommends that, when compiling lists of offenses that can lead to disciplinary action, employers make it clear that these are partial lists.

“As soon as you make a list, I guarantee that some employee will do something that’s not on that list, and then say, ‘you can’t discipline me for that; it’s not on the list,’” he said, adding that because no list can every be complete, employers must provide a measure of leeway. It comes with language along these lines: ‘this list is illustrative only, and there are other offenses for which you may be disciplined that are not listed here.’”

It is in the realm of offenses, and discipline meted out for them, that much debate has been carried out on whether hand-

books constitute binding contracts, said Rothschild, adding that many employers are wary of supplying handbooks because they fear the documents change the employee’s status from ‘at will’ — where they can be terminated for virtually any reason — to something else.

Thus, disclaimers are often included, as well as language clearly stating that the handbook is not a contract. By having the employee read and sign the document, said Rothschild, a business owner can gain a measure of assurance that the employee does not consider the handbook a contract.

Still, some courts have held that, despite clauses stating that the book is not a contract, employers simply can’t ignore promises made in a handbook.

“In light of this recent trend toward disfavoring an employer’s ability to ignore promises made in personnel manual,” said Rothschild, “employers should not include provisions in such a manual unless they are willing to be bound by the terms.”

### The Last Word

While most employers don’t need the unusual step of listing organized gambling under offenses that will lead to termination, most all do need a company handbook, said Abbott, adding that the times — and the conditions — warrant such documents.

But only if they are well thought-out, current, and include language that the employer will honor, he continued, adding that simply having a book is not enough.

“The employer is making commitments,” he said. “Careful thought has to go into those commitments; otherwise, the handbook can do more harm than good.” ♦

*George O’Brien can be reached at [obrien@businesswest.com](mailto:obrien@businesswest.com)*